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Resolved: The benefits of post-9/11 security measures outweigh the harms to personal freedom.

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Topic Analysis by Ryan Hamilton

Introduction

There are a lot of temptations toward bad debate with this topic – trying to break it down into risk/threat quantification (real or potential) versus the relatively unquantifiable harms to personal freedom, speculating on the number or magnitude of thwarted terrorist plots – all manner of crystal ball gazing can be begotten by this topic. Don't give into the temptation of speculation. If the topic could be decided as though it were a math equation, it wouldn't have been a topic selected because it wouldn't be very debatable. Stick to debating the parts that are meant to be debated; think of it as an awesome opportunity to work on your weighing skills.

Affirmative

To begin, I think that the affirmative must stand up to any conceptual arguments that the negative makes – it is easy to forget that the United States is the top target of the world's most insidious terrorist organizations. They want to kill our citizens indiscriminately, and they are willing to sacrifice their own lives in pursuit of their goals. The goal of a terrorist is to wreak as much physical and psychological havoc on the subject of its attacks – their strategic end, when any can be identified, is to make the United States citizen so weary of the attacks that they succumb to the myriad of demands made by whatever terrorist organization is in charge. This includes attacking civilians, making places that are supposed to be safe (like everyday bus stops, train routes, and airports) unsafe.

The affirmative must make sure that the judge remembers this – that the terror organizations that sponsored the 9/11 attacks and their ideological allies are willing to go without wealth, they live in caves, travel great distances, and ultimately are willing to kill themselves in commission of their acts. That cannot be highlighted enough. The threat is real, and it is serious, and it is unlike any other the United States has faced in the past. In this way, it may require extraordinary efforts to fight back, and these efforts may sometimes compromise the personal freedom to what can only be described as a radically small proportion of the population, or it may restrict the personal freedom of many people to a small degree – like airport checks.

I would also like to make a rhetorical argument: the resolution talks about personal freedoms, but not privacy. The affirmative should pressure the negative to show the link between personal freedoms to do things without hindrance and an entitlement to privacy. The link is not a given, and it isn't one that is easily made. If the negative impacts all link back to some nebulous value

of privacy, the affirmative has good grounds to make arguments as to why they aren't clearly topical. Make sure to hold the negative to a high standard when linking the two.

Within that theme, it is most advantageous that the affirmative pick out two or three particular policies that are clearly justified in light of the threats 9/11 revealed. I have illustrated several below for your consideration.

There are clearly some benefits that have outweighed the harms to personal freedom – airport screenings, for instance, have become significantly more thorough. No one can rightly claim a freedom to be armed on an airplane because of the special conditions that surround air transit – e.g., a gunfight like the OK Corral would probably cause the plane to crash and kill all of the occupants on board. More to the point, if only one person were to bring a gun on board, they might use the weapon to hijack the plane – since armed self-defense typically brings a plane down, it becomes all the more important that no one be allowed to have any huge advantage in terms of defense or offense. Asking one to submit to a metal detector and/or a body scan are not unreasonable for this reason.

More to the point, the security gained by this measure has a huge order of magnitude. Not only do millions of people travel by air in the United States every year, but a significant amount of commerce is conducted through travel as well. That's not to mention the once periphery dangers that airplanes posed to people on the ground. Stopping individuals from carrying devices on the plane that allow them to hijack it protects literally thousands of people at a number of targets that in terms of policy must approach infinity, and those are the people who aren't even on the plane.

When put into perspective, the infringement on personal freedom here is minimal. Even if your opponent were to discuss the body imaging concerns and the so-called invasive strip searches, I think that they would be hard pressed to argue that the gains in safety in a post 9/11 world don't warrant the high scrutiny paid to air passengers. No one has a right to fly – if they feel like the body scans are too onerous or the strip searches are a bridge too far, they can opt out by traveling by rail or car. The industry that we protect is more valuable than any one person's claim to not be patted down or have a nameless, faceless x-ray image of their body taken. This is perhaps the clearest, strongest affirmative argument and one that provides the greatest potential when weighing because of 1) the sheer number of people protected and 2) the economic value of the industry that is potentially threatened by terrorism.

Further, it doesn't take a strategic genius to carry out a terrorist attack. There are particular choke points that are fairly obvious that a ne'er-do-well would seek to compromise for maximum

effect. Municipal water sources, power plants, and other central infrastructure sites rush to the mind. It only takes one talented, trained, and fanatically dedicated individual to dump enough poison into a water supply to create havoc that has the potential to injure or kill thousands, cripple local economies, and create fear and hysteria the impacts of which are not immediately foreseeable.

If this is the case, as it clearly is, then the government has a responsibility to keep track of individuals capable or likely to commit these crimes. This includes surveillance and intervention methods that might otherwise be restricted by the law, were it not for things like the PATRIOT Act and other legislative initiatives to empower law enforcement. One of the most persuasive arguments has to do with what we knew about the terrorists who organized and committed 9/11 prior to their act – had we a more forward looking counter-terrorism team (as we do now) equipped with the legal tools to aggressively monitor their activities and intervene against them when the evidence permitted, more than 2,000 people might still be alive today and we could have been spared several wars.

Now that we know what the terrorists are capable of – we should certainly adjust our policies to combat them, particularly when the freedoms infringed or altered (as in the airport examples) aren't that serious anyway. Having a society that is free from the threat of external terrorism that also values personal freedom and privacy aren't mutually exclusive, and don't let the negative impose that false dichotomy on the debate.

At the end of the day, as long as a person is an American citizen or on the territorial United States, all of the rules remain more or less unchanged. It is true that law enforcement can obtain more warrants with marginally less oversight and in greater secrecy, but that doesn't have any effect on your average law-abiding American. There have definitely been abuses of power (see below) but they were using democratically passed laws to net domestic criminals who were not terrorist as the word is commonly understood. The government knowing what sort of library books a person checks out or what sort of material they view on the internet isn't a life changing event for many Americans – it might cause some embarrassment if ever made public, but surely there cannot be a reasonable man who will argue that an individual's embarrassment over their private lives outweighs the need of the government to protect its people from the insidious and real threat of terrorism.

This is the argument that affirmatives need to make to be successful, coupled with the constant reminder that terrorism is real, it is present, and it poses a meaningful threat to every American citizen.

Negative

I honestly believe that this is the harder side to defend. The most egregious violations of personal freedom occur on an isolated military base in Cuba, and the subjects of the infringements on personal freedom are all foreign born individuals captured on the field of battle. Not exactly a sympathetic group of people. Those who have been freed from Guantanamo Bay only to claim that they were innocently imprisoned have failed lie detector tests, and allegations of “torture” that would violate various compacts governing such things have thusly been unsubstantiated. People claim that it is a secret facility – if so, it is a poor example of the government’s ability to keep secrets. It must be one of the most widely documented secret facilities in history.

The biggest argument that I think the negative side has going for it is that the resolution doesn’t limit the impacts of infringements on personal freedoms to United States citizens. The most questionable post-9/11 security measures include warfare, kidnapping, willfully handing over subjects with the knowledge that the governments or agencies receiving the subjects intend to torture and things like that – they just happen outside of our borders. There’s no good reason why negatives shouldn’t be able to talk about them, since it seems the individuals most affected by our anti-terror security policies are foreigners.

In this regard, negatives definitely have the advantage of magnitude and scope when it comes to weighing violations of personal freedom – and the foreign policies that the United States adopts are significantly less sympathetic than the ones we adopt domestically. There is well-documented evidence available for the ambitious debater that covers the policies to which the United States directly subscribes or which we endorse in foreign countries that have led to huge abuses of power and infringements on freedom that would never be tolerated in this country or against one of our citizens. This is where the most fertile negative ground lies –in discussing the external security policies adopted as a direct response to 9/11 as part of the strategy of taking the fight outside of the United States and into the states that are the most sympathetic to terrorist groups.

Domestically, one of the biggest problems with the legislation that has guided the government’s response to 9/11 is that it has been directed at American citizens who also happened to be engaging in non-terrorist criminal activity. The PATRIOT Act has been regularly used against organized crime in the United States – which one might argue is a good thing, but the sort of enhanced measures that are authorized under the PATRIOT Act were done so because of the

nature of terrorism: it's adherents blend in with society and the exact too high a cost to go undetected and unchecked. We gave our law enforcement agencies new power that allowed them to violate privacy rights in a way that was much more difficult prior to this legislation. My imagination tells me that if the debate were done with this knowledge in hand, more Americans would have opposed the PATRIOT Act because they want the primary brunt of its investigatory powers directed at foreign-born terror suspects firstly, and secondly, those who are engaging in acts on a scale similar to 9/11, not the Italian gentleman down the road who works in waste management, selling things that "fall off the back of trucks" for a little extra. The reason here is clear: Americans want a high threshold for rights violations from their government – we're alright with authorizing secret warrants only inasmuch as the person whose property will be searched is suspected of a major crime, not just any old piddling thing.

Topic Analysis by Dave McGinnis

The first thing that jumps out at me about this topic is that it pits a utilitarian impact against an arguably deontological impact. The affirmative gets to research the concrete security benefits that have occurred as a result of post-9/11 security increases, while the negative has to talk about a certain, limited set of rights violations. The strength of the aff position is going to depend in large part on the degree to which the aff can document the concrete successes of terrorist interdiction efforts post-9/11, *and* the degree to which these interdictions *depended upon* measures that “harm personal freedom.”

Framework Issues

The resolution poses a conflict between two values: *security measures*, on the one hand, and *personal freedom* on the other. The question is simple: do the advantages obtained through security measures matter more than the harms to personal freedom that have happened as a result? This brings up a couple of framework issues that could be important:

First, it is not going to be enough for the aff to prove that we have had success stopping terrorism in the post-9/11 world. Any security advantages that have been obtained *without* negative impacts to personal freedom will be “non-unique,” meaning that those advantages could be obtained without any harms to personal freedom, and therefore can’t be claimed as an advantage of the tension between the two values. So the affirmative will have to prove that our security measures require impositions on personal freedom to be successful.

Second, the negative can only access arguments that involve violations of *freedom*. The affirmative could argue that they only have to justify limitations of freedom, not of other values or rights. For example, below I will discuss how some of the more intense impacts of post-9/11 security measures have involved US incursions in Afghanistan and Iraq. These two wars have resulted in over 100,000 civilian deaths, in addition to thousands of soldier deaths. The affirmative can define the resolution carefully to exclude these impacts by arguing that these are instances in which security measures have conflicted with *life*, not simply with liberty.

This strategy limits the degree of impacts that the negative can claim. If the affirmative defines freedom-impacts as being *exclusive* of impacts to other rights, then the negative has to garner *all* offense off of violations of freedom. And, while freedom is an important right, the exclusion of “body count” impacts reduces the possible magnitude of arguments the negative can go for. If the affirmative can do a good job of proving that security measures have stopped major terror attacks, saving large numbers of lives, while simultaneously establishing through framework that

the negative can refer only to violations of liberty, it could be very difficult for the negative to outweigh affirmative advantages.

The strength of the negative position is going to depend on the neg's ability to qualify and quantify the degree of harms to freedom that have occurred as a result of post-9/11 security measures. Two important strategies will help the negative to increase the magnitude of freedom impacts: First, the neg should present analysis about the structural or systemic importance of freedom as a check on state aggression. The historical justification for constitutional freedoms is that the state, with its monopoly on the legitimate use of force, is more dangerous than any individual or group in terms of its ability to violate rights. The purpose of freedom is to check back the power of the state and to prevent it from becoming oppressive. And oppressive states can kill far more people than any terror group or individual criminal, because they do their killing under the guise of "legitimate" institutions like courts and prisons. Undermining freedom in the name of security can easily become a slippery slope; that is, we can always be a *little more* secure, so if you accept the premise that, in principle, we should sacrifice freedom in exchange for security, then our ability to defend freedom is greatly reduced. The state will always be able to justify its intrusions on citizen freedom in the name of increased security. Take this a little bit further: since states typically insist that national security matters must be kept secret, a state needn't even *prove* that their violations of freedom are necessary to promote security. Combine the principle that security overrides freedom and the assertion that security policy requires secrecy, and there is literally *no* protection available in principle for individual liberty, because any violation of freedom can always be justified by allusion to security needs, and the state needn't provide any actual evidence that their claim is true. If the negative can explain this argument in a way that is persuasive to the judge, then they can win the magnitude debate simply by arguing the importance of protecting freedom as a constraint on government abuse. This is a more "LD-style" argument, however, and it may not go over well with PF judges.

Thus the second tool the negative has for magnifying impacts is to point out that violations of *life* are also violations of *freedom*, since dead people are not meaningfully "free." This gives the negative access to arguments (discussed below) about the impacts of US security measures taking the form of military actions in Iraq and Afghanistan.

Security advantages:

Foiling terror plots. Specific individuals have been caught in the planning stages of terror plots. The affirmative can claim the avoidance of the likely impacts of those plots as advantages of affirming. This will take careful research and excellent evidence. It will be important for the affirmative to present evidence on a couple of points:

1. The terror interdiction in question *depended upon* some limitation of freedom. For example, the affirmative could present evidence that some terror plot was foiled as a direct result of warrantless wire-tapping or airport security screenings.

2) The terror plot in question *would have killed a lot of people*. This is difficult to prove with any degree of certainty, naturally, because it's difficult to prove claims about what *would have happened*. However, with the 9/11 attacks as a reference point, it shouldn't be too hard to find evidence that particular terror attacks would have had high body counts.

Other advantages:

The affirmative isn't limited to just arguing about the security advantages of post-9/11 security measures, but those advantages are certainly the ones that spring first to mind. However, it is possible that there are other kinds of advantages that have accrued as a result of the post-9/11 security regime, and if the aff can make a case for these other kinds of benefits, they might catch the negative off-balance. One example that might work in front of some judges would be what could loosely be described as a "politics advantage": That is, the negative public reaction to Bush-era securitization policies fueled the success of the Obama campaign in 2008. Thus, any success of the Obama administration could potentially be claimed as a result of the post-9/11 security policies. For example, the aff could write about the benefits of Obama's health care reforms. These arguments would depend on *very* good evidence that Obama's success in 2008 resulted from negative reactions to security policies (which is probably not actually the case, since the larger issue in 08 was the economy, as it is today.) So, this is probably not a great argument. Politics arguments rarely are, and I imagine they are more challenging in PF than in other forms of debate. But the idea here is to give you a sense of how to construct an argument that claims a non-stock advantage based on security policies.

Freedom advantages for the aff:

One argument type that may make it into aff cases is to minimize the harm done by security policies to personal freedom. There are three basic arguments the aff can make. First, the aff can argue that post-9/11 policies simply didn't violate that much freedom. There are plenty of authors, particularly supporters of the Bush administration, who make this argument. Minimizing the scope of freedom violations will make it harder for the negative to weigh against the anti-terror successes claimed by the aff.

The second argument the aff can make is to grant that a violation of life is also a violation of liberty, and then argue that the lives saved by anti-terror interdictions have therefore also been benefits to liberty. (Remember, a person killed by a terrorist is no longer alive, but they are also

no longer free.) So the aff can claim that any small harms to personal freedom that come from security policies are vastly outweighed by the *increase* in freedom that occurs as a result of foiling terror attacks.

Third, the affirmative can claim that their success in toppling oppressive leaders and regimes like Saddam Hussein and the Taliban are advantages to freedom that result from post-9/11 security policies. Terrorists, the affirmative can argue, are supported by oppressive regimes, and they aspire to install *new* oppressive regimes. To the extent that post-9/11 security policy has prevented terrorists from being successful, and eliminated terror-supporting dictators, these policies have greatly *increased* freedom. So the aff has the potential to outweigh the negative both in terms of increases in security *and* increases in liberty. If the aff does a good job on these points, it could be very tough for the neg to outweigh them in a stock debate.

Rights violations:

Privacy: The most obvious rights violation that has gotten a lot of press recently is the full-body scanner at the airport. Both liberal and conservative groups have complained about this, because the scanners generate actual naked images of the people being scanned. Add to that that anyone who refuses to go through the scanner has to undergo a “full body pat-down.” And, there has been significant coverage of the ill treatment of the elderly and people with prosthetics or other medical devices attached to them. Older people with colostomy bags have been forced to show them to airport security personnel, which can be highly embarrassing.

However, other privacy rights violations might be even more significant. The Bush administration initiated a process of warrantless wiretapping, which allowed them to eavesdrop on phone calls and other electronic communications of both foreign citizens and Americans. There was a lot of press about this issue in the mid-2000s.

Guantanamo Bay: Two kinds of impacts can be drawn off of the Guantanamo story. The first impact is a rights impact. Hundreds of people have been held at Guantanamo without formal charge, often for years at a time. Subsequent evidence has proven that many of those folks have been completely innocent. So, that’s a serious rights violation. However, the second impact is potentially greater. Guantanamo (and other security-related scandals, like Abu Ghraib) have (arguably) led to significant backlash against the US, serving as terror recruitment tools and encouraging

Torture: The US has engaged in torture both directly and indirectly. Directly, there is evidence that US military interrogators and CIA interrogators used “enhanced interrogation techniques” on terror suspects of various stripes in the post-9/11 era. This argument obviously overlaps with the

Guantanamo Bay/Abu Ghraib analysis above, but those are not the only places where torture has been used.

The second way that the US engages in torture is indirectly through a process called “extraordinary rendition.” Rendition means handing over a suspect of some kind to a foreign authority. Extraordinary rendition is when we hand over a suspect to a foreign authority with the implicit understanding that the other authority will use torture to extract information, to which we will then have access. So “extraordinary rendition” is sort of torture-by-proxy.

Norm creation: This is an argument often made in LD debate circles, and it may be a tough sell in PF debate. Many IR authors write about the importance of setting rights-positive international norms. They argue that when countries, particularly powerful countries like the US, violate rights, it sets a standard that such rights violations are permissible.

Civilian deaths: Arguably, both the wars in Iraq and Afghanistan have been the result of post-9/11 security measures. We invaded Afghanistan in 2001 because we believed that they were giving aid and shelter to the terrorists who attacked us. And the second Iraq war was sold as a part of the “war on terror” because, supposedly, Saddam Hussein’s government was aiding terrorists and building weapons of mass destruction. Both wars have had massive impacts, particularly on the civilian populations of those countries. If you can persuade the judge that we should consider the effects of rights violations not just on US citizens but also on foreign citizens, then you can access a very large “body count” impact. The website www.iraqbodycount.org currently lists the number of civilian deaths in Iraq at between 102,000 and 111,600. Tens of thousands more have been killed in Afghanistan. If you can convince the judge that these deaths count as a result of “post-9/11 security measures,” you can counter the more concrete “body count” statistics that the affirmative will offer as a result of “avoiding terror attacks.” Another benefit to this argument is that these deaths are *verified* impacts; that is, they’ve already happened. Any claims the affirmative might make about avoiding terror attacks will always be speculative -- it’s much harder to prove that you have avoided a death than it is to prove that a death has happened.

One note as you prepare: Try to bear in mind that these are real-world impacts, and treat this information with some respect. When you talk about Iraqi and Afghani civilians and soldiers from various countries being killed, you are referencing actual tragedies that have befallen real people here and abroad. These are not just numbers in a column to help you win a debate. If you treat this material insensitively, you may turn off some of your judges, but more importantly, you should be learning to be sensitive, serious, responsible researchers. Don’t be insensitive to tragedy; we are humans before we are debaters.

Other negative arguments:

Solvency deficits. The negative can present information that indicts the ability of the affirmative to solve for both freedom and security impacts.

Time frame: the negative can argue that the resolution takes place in the *here* and *now*. Most of the affirmative examples of successful terror interventions are going to reference things that have happened over the last ten years. The negative can claim that those events, having already occurred, are not unique to either side. The resolution directs us to look at what is happening *today*. If the negative can convince the judge that the benefits of rights violations have dried up -- that all the good to be gained from rights limitations have already been gained -- that can undercut much of the affirmative advocacy. The neg's position can basically be, "There was a time when this resolution was true, but now that Al Qaeda has been defeated, it's simply no longer the case."

So, to summarize:

The stock debate on this topic is going to consist of affirmatives presenting evidence that post-9/11 security measures, while implicating individual freedom, have been successful in saving lives and/or undermining the oppression of terrorists and terror-supporting dictatorial regimes.

The stock negative will counter that these security policies have gone vastly overboard, increasing state oppression, making us all less free, and potentially costing hundreds of thousands of innocent lives in quixotic attempts to intervene in international politics.

Topic Analysis by Adam Torson

This September's resolution will provide an excellent kick-off to the debate season. It implicates a number of timeless concerns as well as important current events issues. As I will discuss below, the topic is incredibly broad, so it will pay to start thinking now about how you want to interpret and frame the resolution so that it doesn't take you the whole month to figure out the approach you want to take.

Interpretation

A. "Benefits"

The first important term to think about in the topic is "benefits." Note first that it is essentially open ended. Unlike "personal freedom" the pro is free to invoke virtually any benefit it can think of to weigh against the harms to personal freedom. For this reason I encourage you to think creatively about the possible benefits you might invoke.

One difficulty the pro will have is articulating concrete impacts. The most obvious successes of post-9/11 security measures are the foiling of terrorist plots. As law enforcement officials are quick to remind us, however, most of their successes are in secret. We tend not to disclose most successful techniques for combating terrorism because doing so would undermine their effectiveness. Furthermore, many of the advantages claimed by the pro will have to invoke counterfactuals – what would have happened had we not implemented a given security measure? This will have to be weighed against fairly concrete and specific harms the con will get to invoke. So, think about how you are going to address this issue on the pro and how you might exploit it on the con.

Finally, remember that the benefits in question are only those deriving from *post-9/11* security measures. In other words, what was the increase in security *on the margin* provided by these new measures? It is true that there has not been a foreign terrorist attack on American soil since 9/11, but there was not an attack of that nature for many years preceding 9/11. The resolution doesn't ask us to weigh our security against our liberty, but rather whatever additional security we've gained since 9/11 against the harms to personal freedom. Smart Cons will not allow the Pro to claim as an advantage national security as a whole.

B. "Post-9/11 Security Measures"

While technically a post-9/11 security measure could be just about anything happening after that date in 2001, contextually it probably indicates security measures taken in response to terrorism. In other words, the stimulus bill and the healthcare bill of the last two years can in some sense be said to implicate “security,” but they are almost certainly not part of the resolution. The most borderline case is the Iraq War. While sometimes invoked as a justification before the war, the claim that invading Iraq somehow addressed terrorism is highly controversial. Some argue that Iraq was a probable supporter of terrorism or that it could have been in the future. Others argue that other justifications for going to war were stronger both publicly and among policy-makers. In any case, the big impacts deriving from this possible instance of the resolution are pretty substantial, so you will definitely want to prepare arguments for interpretations that both include and exclude the Iraq war as part of the resolution.

Another question is whether the resolution implicates only ongoing security measures or whether it also includes measures that have been discontinued. For example, only certain parts of the Patriot Act were reauthorized when the sunset provision took effect. Military commissions to try unlawful combatants being detained at the Guantanamo Bay facility have long been planned but have not even started yet. The resolution seems to use the term “outweigh” in the present tense, suggesting that only post-9/11 security measures that are ongoing count. At the same time, the *benefits* of measures that are now discontinued may be ongoing, so one could also plausibly argue that measures taken in the past (like the discontinued portions of the Patriot Act) are still part of the resolution.

The most difficult part of this resolution is that it is incredibly broad. Post-9/11 security measures could encompass dozens or even hundreds of individual measures. The Patriot Act alone has ten titles, some of which have dozens of legal changes or innovations. The United States has engaged in two major wars, each of which has numerous components that can be parsed out (e.g. the invasion of Iraq versus post-war management versus the timetable of withdrawal, etc). In general these wars were based on the “One Percent Doctrine” – the theory that even a miniscule probability of a catastrophic terrorist attack, especially with a weapon of mass destruction, justifies the preemptive use of military force. The military has undergone substantial changes in its organizational structure designed to more effectively address the need to provide global security. The National Security Agency has utilized a warrantless wiretapping program that has drawn substantial controversy. An entire new cabinet department was created – the Department of Homeland Security – and many federal agencies were reorganized around it. The United States has detained numerous terrorism suspects at the Guantanamo Bay facility and has proposed to try them with military commissions. It has also utilized interrogation techniques that

some believe to be torture, and allowed the extradition of detainees to countries where it is believed they were tortured.

Obviously this presents substantial difficulties for the need to pass judgment on all of these measures as a whole in the course of a four minute speech. To avoid getting bogged down in debates where you and your opponents are simply talking past one another, it is imperative that you find ways to narrow the debate. There are a few strategies you might employ to accomplish that objective. First, it would be prudent to articulate some kind of framework which establishes the priority of certain kinds of impacts. For example, the pro might argue that safety is a prerequisite to a free and pluralistic society, and so effective security measures should have priority over moderate invasions of privacy, for example. The hope is that this focuses the debate on whether post-9/11 security measures have been effective and limit negative offense to major invasions of freedom. Conversely, the Con might argue that Constitutional restraints are essential to preventing the government from substantially overstepping its bounds, and so Constitutional violations should be the most important impact. The hope would be to focus the debate on specifically alleged violations of the Constitution.

Second, you might attempt to organize your case position around particular values rather than specific programs to make your analysis more summary in nature. For example, you might argue that privacy is a fundamental American value, and then talk summarily about the different ways it has been limited by post-9/11 security measures like NSA warrantless wiretapping and the Patriot Act.

Third, you can interpret the phrase “post-9/11 security measures” very narrowly. You might argue that security measures are only those undertaken by law enforcement rather than the military, because military action always has purposes that are not directly tied to terrorism. You could also argue that the resolution would have used the phrase “war on terrorism” if it meant to implicate both foreign and domestic action. Additionally, you could employ the arguments I described above to claim that the resolution is limited to the post-9/11 security measures that are ongoing rather than those that have been discontinued. I will discuss some narrow interpretations of “harms to personal freedom,” below.

C. “Outweigh”

The concept of “weighing” benefits versus costs suggests that the relevant interests can be judged on the same metric. As I indicated above, some framework further specifying that metric may be useful in framing arguments persuasively and enabling concrete and specific

comparisons. What are the basic values which American policy should strive for? Democracy? Constitutionality? Equality? Individual Autonomy? These aren't necessarily mutually exclusive, but conceptualizing your impacts in terms of these or other fundamental values will help to suggest a metric with which both the benefits of security measures and losses to personal freedom can be judged.

Remember that the resolution specifically calls for you to weigh advantages versus disadvantages. Many debaters will make the mistake of listing all the benefits of post-9/11 security measures or the harms to personal freedom without doing express comparative analysis between the two. Make sure you invest time doing this. The crux of the resolution is how to balance the competing interests in freedom and security, which means that talking about the relative importance of these values is more important than simply articulating what one side of the scale looks like.

D. "Harms to Personal Freedom"

Cons must presumptively argue that harms to personal freedom outweigh any and all benefits deriving from post-9/11 security measures. This means that it will be in your interest both to emphasize the degree to which individual liberty has been compromised and to argue that the security measures in question have not had substantial marginal benefits. Like the "benefits" described above, the harms to personal freedom must be a result of post-9/11 security measures. Harms to individual liberty which derive from programs pre-dating 9/11 are not Con ground.

As I indicated above, it will be important for the Con to articulate a metric through which to evaluate harms to personal freedom. It will obviously be strategic to construct that metric so that it emphasizes the fundamental value of individual liberties in the United States. That said, I encourage you to think broadly about what personal freedom might entail. Certainly there are violations of concrete rights to be considered, but also consider whether there are more subtle effects to enhanced post-9/11 security. For example, when we view religious minorities or people of Arab extraction with suspicion, we may not formally violate their rights, but we have probably restricted their personal freedom in a very important way. When we ostracize dissenters in the name of patriotism, we again have not probably infringed any legal right, but we have violated a basic value related to personal freedom.

Finally, remember that it will generally be advantageous to interpret the resolution in ways that narrow its scope. There are a couple of ways you might do this. First, the resolution specifies *personal* freedom, meaning it is at least plausible to distinguish this from other types of freedom.

Personal freedom may be contrasted to collective freedoms, such as those claimed by groups – e.g. claims of Native American groups to sovereignty over particular territories or perhaps claims by states that state rights have been infringed by the increasingly pervasive federal presence in law enforcement. These are conceptions of freedom which are not likely to be invoked in any case, but as always it pays to think about how to parse the resolution as precisely as possible.

Second, it is unclear whose personal freedom is being implicated. A substantial portion of the literature on post-9/11 security measures deals with programs that violate the personal freedom of non-US citizens; e.g. the detention of unlawful combatants, extraordinary rendition and torture, and the invasions of Iraq and Afghanistan. The pro may argue that the personal freedoms implicated given the context of the resolution are those belonging to American citizens or perhaps rights specifically due American citizens. The Con will obviously attempt to establish the opposite to get access to more substantial impacts.

Pro Arguments

A. Concrete Successes

One strategy the pro might adopt would be to talk about the concrete successes of post-9/11 security measures as general indicators that America is substantially safer than it was before 9/11. The most general but maybe the most important of these arguments is that there has not been another major attack by foreign terrorists on American soil since 9/11. Earlier I indicated that there wasn't a substantial foreign terrorist attack on the United States in the several years leading up to 9/11 either, but that fails to acknowledge the presumptive increase in risk that would be attributed to a demonstration of American vulnerability and an increasingly heavy handed American global presence. Many argue this foments anti-Western sentiment and thus drives terrorism. Specifically, there are a number of terrorist plots which are publicly known to have been thwarted by law enforcement and military efforts (depending on the source that number is as high as several dozen), and officials claim many that cannot be discussed publicly.

Another high profile success in recent months was the killing of Osama Bin Laden by American Special Forces in Pakistan. Many attribute this success to improved and patient intelligence gathering. Bin Laden was not only the leader of Al Qaeda when the 9/11 attacks occurred but was also its symbolic and spiritual leader.

Finally, the Pro might argue that the U.S. military missions in Iraq and Afghanistan are a benefit to post-9/11 security measures. While this is obviously a controversial proposition, the Pro will argue

that these actions denied terrorists important safe-havens and bases of operation, ousted brutal authoritarian regimes, and deterred other nations from pursuing weapons of mass destruction or aiding and abetting terrorist activity.

It will be important in these scenarios to clearly articulate the potential impact of another major terrorist attack, which the Pro will claim to have averted. This includes both short and long term economic destabilization (particularly given the fragile state of the global economy at the moment), racist reactions and heavy handed U.S. military responses. Such an attack may be much deadlier than the 9/11 attacks if terrorists succeed in acquiring nuclear, chemical, or biological weapons.

B. Process Achievements

Given the difficulty of demonstrating that a terrorist attack did not happen that otherwise would have, an alternate route that many Pros might employ will be to point to the improved procedures for combating terrorism due to post-9/11 security measures. These arguments will be more analytical than empirical. For example, the Pro can point to better coordination in the intelligence community, the expansion of human intelligence gathering and the increasing sophistication of signals intelligence gathering. Along similar lines, the Pro can point to various pieces of federal legislation responsible for improving coordination between federal resources and state and local law enforcement agencies and first-responders. Such cooperative measures are credited with foiling several terrorist plots. The Pro will show how the restructuring of theatres of command in the military better positions U.S. military resources to meet security threats in the modern world. They will argue that tools to track and freeze terrorist assets are more sophisticated and thus more effective. They will argue that surveillance laws have permitted swifter interdiction that was not previously possible and that surveillance policies have been updated to reflect the realities of the 21st century.

This list is not exhaustive, but it does suggest that on its face it seems that we have substantially improved our capabilities to stop a terrorist attack. While the Con is tasked with arguing that measures such as these are collectively too burdensome on personal freedom, it will be difficult to disavow completely many of these programs which do not seem to pose a substantial threat to personal freedom.

C. Defense on Personal Freedoms Arguments

Because the resolution is about comparing the benefits of post-9/11 security measures with the corresponding harms to personal freedom, and important part of the Pro position will be mitigating the degree to which personal freedom is violated by the measures it is defending. A few strategies might be employed to accomplish this objective.

First, there are many instances where post-9/11 security measures simply codified existing practices or judicial precedents. For example, many argue that the enhanced surveillance techniques made infamous by the Patriot Act were common practice even before 9/11. The ability to use expedited FISA warrants for certain internet surveillance, for instance, was widely believed to be the correct interpretation of federal law before the Patriot Act made it explicitly so. Similarly, there is precedent for the use of military commissions to try individuals who do not fall within the jurisdiction of the Uniform Code of Military Justice, such as spies or those not conforming to the Geneva Convention requirements for POW status.

Second, a number of post-9/11 security measures simply updated the law so that pre-existing concepts applied more directly to modern society. For instance, roving wiretaps recognize the reality that a person's probable mode of communication is much more variable than it was when people had a single landline in their homes. The extension of so-called "Pen Register" statutes to the internet simply recognizes that if information on the outside of an envelope or a phone number given to the phone company so they can route a call is not private (by virtue of its being voluntarily revealed to a third party), then analogous delivery information given to an internet service provider (ISP) to direct the delivery of an email should also not be deemed private. Again, much of what has been called unprecedented really is not.

Third, commentators who are supportive of most post-9/11 security measures argue that criticisms of those measures are politically motivated and rarely informed by the facts. Again using the example of the Patriot Act, a number of provisions actually protect privacy to a greater degree than is Constitutionally mandated due to the input of civil liberties-conscious Congressman. For example, subjecting internet information to the proof requirements of the FISA court likely imposes a heavier burden on law enforcement than would otherwise be required; in the absence of federal statute, many believe that police would not have to obtain any kind of warrant to conduct this type of surveillance.

Fourth, the Pro can argue on a more conceptual level that security is a logical prerequisite to many of the personal freedoms Americans enjoy. When we are physically unsafe many of the liberties we enjoy are mere formalities. For example, when criticizing a religious leader can result in violent retaliation (as was the case when newspapers published cartoons of the Prophet

Muhammad), the freedom of speech and of the press is seriously compromised. When people are assaulted or even murdered for practicing their religion publicly (as has been the case with a number of practitioners of Islam since 9/11), there is no meaningful freedom of religion. Thus providing for security from foreign threats might legitimately be characterized as the first duty of a government.

Fifth, many of the violations of personal freedom that the Con might criticize will relate to the personal freedoms of non-U.S. citizens – e.g. indefinite detention at Guantanamo or Predator Drone strikes in Pakistan. There are a number of political theories (e.g. the Social Contract or Communitarian traditions) which suggest that social and geographic ties between people and government mean that government has a primary obligation to its own citizens. If the security and liberty of citizens is in conflict with that of foreign citizens, this argument goes, the government should prioritize the interests of its own people.

Con Arguments

The objections to the various post-9/11 security measures are as numerous as the measures themselves. An exhaustive list is not possible here. Instead I will indicate several different categories of personal freedoms that may be advantageous to discuss and illustrate how various security measures infringe on them.

A. Privacy

Privacy is a fundamental freedom. It represents the ability of a person to make autonomous choices without undue government interference, and recognizes that being constantly surveilled by the government tends to alter and moderate ones choices and habits. The right to privacy is the acknowledgement that there are multiple legitimate ways of life in a pluralistic society and that within certain limits people should be allowed to pursue happiness.

There are many post-9/11 security measures which may violate the right to privacy. The NSA has been widely criticized for its Warrantless Wiretapping program, which seems to fundamentally contravene the Fourth Amendment's requirement that a detached judicial magistrate evaluate the sufficiency of the probable cause before a government agent conducts a search into a citizen's person, houses, papers, or effects. These wiretaps are supposed to be of phone calls between U.S. and foreign citizens suspected of terrorism, but it is extremely difficult to separate out domestic calls. The Patriot Act authorizes lower thresholds for government surveillance in a number of ways, including provisions which allow access to generally immaterial information like

what books a suspect checks out from the library. It encourages the use of Carnivore, a “packet sniffer” that conducts online surveillance without a great deal of discretion and largely without judicial oversight. These are just a few of the many criticisms of post-9/11 security measures generally and the Patriot Act in particular on the grounds that it invades privacy.

B. Racism and the Freedom of Association

Racism is a violation of a person’s fundamental freedom because it holds him responsible not for his personal actions but from the perceived defects of a social group to which he belongs. Racist policies dehumanize and therefore treat people without the appropriate degree of moral respect. They reduce the practical and psychological barriers that prevent horrible abuses. Freedom of association is also an important personal freedom. In a free society people must be able not only to think and speak freely, but also to join with those of similar persuasion to attempt to effectuate both private goals and public, political ones.

Many post-9/11 security measures have been accused of racism, either in conception or by turning a blind eye. In the wake of the attacks an enormous number of people were rounded up on immigration violations and held indefinitely and often without articulable cause. Many charge that there was patent racism employed when making determinations about status and release. There is substantial evidence that enhanced screening in airports and by police employs racial and religious profiling. Advocacy groups have been labeled as supporters of terrorism. Those detained indefinitely at Guantanamo and subject to “heavy interrogation,” are denied basic human rights.

C. Due Process

The norm of due process requires that individuals be given a fair set of procedural protections to ensure that their liberty is not unduly circumscribed. The absence of due process allows government officials to make decisions arbitrarily or capriciously, and thus undermines the freedom people feel to make choices in relation to a stable set of rules.

There are many practices promulgated post-9/11 that run afoul of due process norms. The indefinite detention of unlawful combatants or trial by military commissions without rigorous rules of evidence, the right to counsel, etc. are obvious examples. Asset seizure rules have been loosened to allow swifter action against terrorist monies, but in the process the normal rules preventing the government from taking your property without warning have been compromised.

The failure to have meaningful hearings and standards of proof for holding people on immigration violations is still another example.

D. Constitutionalism and Check and Balances

Constitutionalism protects personal freedom because it says that the government must always conform its choices to rules protecting a person's basic moral status and legitimate freedom of action. The ability to deviate from fundamental rules again opens the door to arbitrary government action or unjustifiably heavy handed regulation of everyday choices. On a similar note, Constitutions often build checks and balances into the system of government to prevent any one entity from accumulating too much power and thereby becoming a threat to personal freedom.

The Constitutional challenges to post-9/11 security measures are incredibly numerous. Challenges to the scope of Executive power claimed since 9/11, the extent of permissible government surveillance under the Fourth Amendment, the watering-down of rights to due process guaranteed in the Fifth, Sixth, and Eighth Amendments in immigration and illegal combatant prosecutions, and the First Amendment rights to speak and associate freely given the promulgation of terrorist watch lists and asset tracking are just a few. There is voluminous literature on this area of the topic.

E. Post-9/11 Security Measures Are Not That Effective

As the Pro was obliged to play defense against the violations of personal freedom asserted by the Con, so too will the Con be obliged to mitigate claims to the effectiveness of post-9/11 security measures. Again, several strategies suggest themselves.

First, the most striking responses to 9/11 were the invasions of Iraq and Afghanistan. Many argue, however, that these actions (especially the Iraq War) only make the problem of terrorism worse. A continued military presence in the Middle East and Central Asia fuels Islamist narratives about the imperialism of the West and foment resentment toward allied forces. Indeed there is virtually no evidence that Iraq was a substantial supporter of terrorism before the War; now it is among the "front lines" in the war on terrorism.

Second, the failure of the United States to live up to its values also motivates anti-Western sentiment. The highly public human rights abuses at Abu Ghraib and Guantanamo, and through the process of extraordinary rendition, plausibly justify claims that the United States is interested in maintaining its hegemonic power and not in supporting or following internationally accepted

codes of conduct. This along with the wars helps to push the moderate Muslim world (which is the vast majority of all practitioners of Islam worldwide) to sympathy with radical sects even if they don't share their interpretations of the Koran or their support of violence. The most concrete manifestation of this phenomenon is the ability of terrorist groups to use these abuses as recruiting tools.

Third, there is a growing fear of domestic terrorism and radicalization of local populations as a result of increasingly heavy handed government repression. These fears are especially salient in Europe but are increasingly common in the United States, particularly since the fatal shooting of 13 U.S. military personnel (and the wounding of many more) at Fort Hood by an Army Major with apparent ties to terrorist groups.

Finally, remember that the Pro can only take credit for the marginal gains in security due to post-9/11 security measures. Do not let them take full credit, for example, for the fact that there has not been a major foreign attack since 9/11 – obviously that has a lot to do with security measures that predate the attacks.

Conclusion

This topic is incredibly broad but an incredibly important question for U.S. policymakers going forward. Enjoy getting in depth on the research, and best of luck to everyone in the inaugural topic of the 2011-2012 season!

Topic Analysis by Nathan Zerbib-Berda

This topic requires us to take an in-depth look at the policies, security measures, and possibly the wars that occurred in the wake of September 11, 2001. To debate this topic we must examine U.S. foreign and domestic policy of the last ten years, and how the war on terror has both protected and violated personal freedoms. Security versus freedom is a continuing source of conflict for policymakers as we must determine how much of our rights we are willing to sacrifice for freedom, and what freedoms cause an unacceptable risk to the public's health and security. There is extensive literature written about 9/11 and its aftermath, and most published political scientists have addressed this issue in the last ten years. When you are researching articles on the post-9/11 security measures always remember to make the important distinction between opinions and facts. Political authors usually have a political agenda or reason for writing the things they do, and you should look for substantive analysis rather than partisan rhetoric in your research. Remember that this topic analysis is merely a starting point for you to begin your own research and discovery on the resolution. There are no right answers in debate, and the only way to make arguments stronger is to try and tear them down. While reading this analysis try and find ways to agree and disagree with what I am saying. Write down your arguments, they will be useful.

Part 1 – Historical Background

A. September 11, 2001.

While I'm sure most of you are familiar with the tragic events of September 11, 2001, it is always necessary to begin your topic research with a firm understanding of the historical events behind the resolution. The September 11, 2001 attacks, often referred to as 9/11, were a series of four coordinated suicide attacks by the terrorist group al-Qaeda on the United States. On the morning of Tuesday, September 11, 2001, 19 al-Qaeda terrorists hijacked four commercial passenger jet airliners. The terrorists intentionally crashed two planes into the Twin Towers of the World Trade Center in New York City. Both towers collapsed within two hours of the attack, taking thousands of lives and causing massive devastation in the surrounding area. Nearly 3,000 people died as a result of the 9/11 attacks. A third plane was hijacked and crashed into the Pentagon in Arlington, Virginia right outside the city lines of Washington, D.C. There was a fourth planned terrorist attack where hijackers had directed another plane towards Washington D.C., presumably targeting either the Capitol Building or the White House, but the plane crashed in a field in rural Pennsylvania when the passengers attempted to take control of the plane from the terrorists. There were no survivors from any of the flights. The overwhelming majority of lives taken on September 11 were that of civilians.

The terrorist group al-Qaeda, lead by Osama bin Laden, immediately received blame for the attacks. Osama bin Laden initially denied involvement in the attacks, but eventually claimed responsibility for them in 2004. Al-Qaeda and Bin Laden claimed that United States support of Israel, the presence of U.S. troops in the middle east, and economic sanctions against Iraq were all motives for the 9/11 attacks. U.S. citizens were initially horrified that an attack like this could occur within our borders, grieved at the lives lost and reacted with strong outrage towards al-Qaeda as well as Afghanistan and Iraq. The United States responded quickly to the attacks by launching the War on Terror.

B. The War on Terror

The War on Terror is an international military campaign led by the United States and the United Kingdom with the support of other North Atlantic Treaty Organization (NATO) countries, as well other countries not in NATO. The purpose of the War on Terror was to seek out and eliminate all potential terrorist threats, with the priority target of al-Qaeda and Osama bin Laden. The phrase “War on Terror” was first used by then-President George W. Bush as well as then-Defense Secretary Donald Rumsfeld to denote a global military, political, legal and ideological struggle against terrorist organizations and governments that either harbored or supported terrorist organizations. More broadly the term has been used against any nation or individual that has posed a threat against the United States and its interests. The focus of the War on Terror during the last ten years has mainly been on militant Islamists and extremists. The Obama administration has declined to use the phrase War on Terror, opting instead to use the term Overseas Contingency Operation, but the War on Terror is still used commonly by many politicians as well as the mainstream media. There is an even a government honor associated with the war, the United States’ Global War on Terrorism Service Medal.

C. The War in Afghanistan

After launching the War on Terror, President George W. Bush launched armed forces into Afghanistan on October 7, 2001 under the name Operation Enduring Freedom. The goal of the operation was to eliminate the Al-Qaeda terrorist organization as well as remove the Taliban regime from power. The Taliban is an Islamist militia group that ruled large parts of Afghanistan and are supporters of terrorism as well anti-United States groups. The Taliban is also notorious for their mistreatment and rights violations of women. The United States was able to quickly oust the Taliban from power shortly after the start of the War in Afghanistan. Most of the Taliban leadership fled to neighboring Pakistan. Osama Bin Laden was eventually captured and killed in Abbottabad Pakistan in May, 2011. However, the Taliban still has a presence in Afghanistan with support in many regions. Since its removal from power the Taliban has launched an insurgency

campaign and has been responsible for many attacks against U.S. troops. According to a report by the United Nations, the Taliban was responsible for 76% of civilian casualties in Afghanistan in 2009.¹ The War in Afghanistan is still ongoing, and will reach its 10 year anniversary this October.

D. The USA Patriot Act

Perhaps the biggest legislative reaction to the September 11 attacks was the creation and enactment of the USA Patriot Act, passed by Congress and signed into law by President George W. Bush on October 26, 2001. The title of the act is a ten letter acronym (USA PATRIOT) that stands for: United (and) Strengthening America (by) Providing Appropriate Tools Required (to) Intercept (and) Obstruct Terrorism Act of 2001. The act gave substantial power to law enforcement agencies in their search for terrorists and terrorist organizations by allowing enforcement agencies to search and wiretap telephone communications, e-mail communications, medical, financial and other records. Federal Agencies may use roving wiretaps, search business records and public records such as library records, and may conduct surveillance of individuals suspected of terrorist related activities. The Patriot Act also gave enforcement agencies such as the National Security Administration (NSA), the Central Intelligence Agency (CIA), the Federal Bureau of Investigations (FBI) broader powers in regards to foreign affairs and tracking foreign individuals. The Patriot Act reduced restrictions on federal agencies, and broadened their powers. The act also gave substantial power to immigration authorities in detaining and deporting immigrants suspected of terrorism-related acts. The act also encompassed domestic terrorism, giving these agencies broader powers over U.S. citizens as well, and enlarged the number of activities to which the Patriot Act's power applied to. On May 26, 2011, President Barack Obama signed a four-year extension of the Patriot Act.

E. The Department of Homeland Security

Another significant government reaction to the September 11 attacks was the creation of the Department of Homeland Security (DHS), a cabinet department of the federal government. The DHS was created on November 25, 2002 in response to the September 11 attacks and with the primary responsibilities of protecting the territory of the United States from and responding to terrorist attacks, man-made accidents, and natural disasters. In 2011 the DHS received a budget of nearly \$100 billion dollars and spent \$66 billion. As the Department of Defense is responsible for military action and policy abroad, the DHS took that role for the domestic concerns and policies of the U.S. The DHS is responsible for responding to any terrorist attack that could occur

¹ <http://www.weeklystandard.com/blogs/taliban-responsible-76-deaths-afghanistan-un> *The Weekly Standard* - 08-10-2010

within our borders. In March 2003, the DHS absorbed the Immigration and Naturalization Service and assumed its duties and responsibilities. Thus the DHS has expansive power over immigration in the United States, and has acted consistent with protectionist policies since the DHS assumed power over immigration. The DHS also assumed border enforcement responsibilities from the INS, U.S. Customs Service, and the Animal and Plant Health Inspection Service giving the DHS power to regulate and control our borders. In its short life as a government agency, the DHS has grown to become the third largest Cabinet department with over 200,000 employees. According to Peter Andreas, a border theorist, the creation of DHS constituted the most significant government reorganization since the Cold War, and the most substantial reorganization of federal agencies since the National Security Act of 1947, which created the National Security Council and Central Intelligence Agency.² DHS also constitutes the most diverse merger of federal functions and responsibilities, incorporating 22 government agencies into a single organization.

F. The War in Iraq

The War in Iraq, also known as the Second Gulf War and Operation Iraqi Freedom, began on March 20, 2003 with the invasion of Iraq by the United States and the United Kingdom. Shortly after the September 11 attacks, the governments of the United States and the United Kingdom believed that Iraq had been creating and storing weapons of mass destruction or WMDs, which threatened global security and the security of the United States. U.S. officials also believed that Iraqi President Saddam Hussein was harboring and supporting al-Qaeda, but no evidence of a meaningful connection was ever found. Colin Powell, then Secretary of State, testified in front of the United Nations on behalf of the U.S. claiming that Iraq had created and stored WMDs within Iraq's borders. In 2002, the United Nations Security Council passed Resolution 1441 which called for Iraq to cooperate with U.N. weapons inspectors to ensure that Iraq was not harboring WMDs. The results were mixed, as head weapons inspector Hans Blix informed the U.N. that while Iraq was cooperating, they were not cooperating fully or immediately. Hans Blix was unable to ascertain whether Iraq possessed WMDs and requested more time. The U.S. was unwilling to wait for further U.N. investigations and invaded Iraq in 2003.

The invasion of Iraq led to the United States occupation of Iraq and the eventual capture of Saddam Hussein, who was later tried in an Iraqi court of law and executed by the new Iraqi government. The war is still ongoing and with the vast majority of fighting taking place between U.S. troops and the Iraqi insurgency. Iraq's government is still unstable and without the full support of the people, and Iraq is still facing significant problems. In 2008, the UN reported an estimate of 4.7 million Iraqi refugees (16% of the population) with 2 million abroad and 2.7 million

² Peter Andreas: Redrawing the line 2003:92, additional text.

internally displaced people.³ In 2007, Iraq's anti-corruption board reported that 35% of Iraqi children, or about five million children, were orphans.⁴ The Red Cross stated in March 2008 that Iraq's humanitarian situation remained among the most critical in the world, with millions of Iraqis forced to rely on insufficient and poor-quality water sources.⁵ The war in Iraq is still ongoing, and while many agree that the newly formed Iraqi government is preferable to the Saddam Hussein regime, the country still faces many problems and U.S. troops remain in Iraq.

While the War in Iraq may be the most significant government action the United States has taken in the past 10 years, it may also be difficult to prove that the war was a direct response to the 9/11 attacks, or would constitute a "post-9/11 security measure" in context of the resolution. The stated reason for invading Iraq was a search for weapons of mass destruction, but even when it was clear the weapons did not exist the U.S. remained in the region to construct a stable government, have a democratic presence in the middle east, and to continue to fight the war on terror. Nevertheless the public support for the war clearly came from the outcry to the September 11 attacks, and the war has often been associated with the war on terror. There is an argument for both debaters as to whether the War in Iraq can be classified as a "post-9/11 security measure."

Part 2: PRO Strategies

A. Post 9/11 security measures have been successful.

The main strategy of any debater arguing for the PRO side of the resolution is that the security measures that were put in place after the 9/11 attacks have been empirically successful. This is evidenced by the fact that there has not been another terrorist attack on United States' soil since 9/11. You'll want to argue that everything the U.S. has done, the War on Terror, the Patriot Act, the creation of the Department of Homeland Security, even both wars have ultimately lead to a safer and better protected United States. The War on Terror has killed hundreds of terrorists and detained thousands more, and in a world where terrorism is increasingly more threatening to both governments and citizens, the post-9/11 security measures have done more to stop terrorism and protect citizens more than any other government policies in recent history. If the goal of post 9/11 security measures was to prevent another 9/11 from happening, then thus far they have been successful.

B. Post 9/11 security measures have prevented and deterred terrorist attacks.

³ UNHCR – Iraq: Latest return survey shows few intending to go home soon. Published April 29, 2008. Retrieved May 20, 2008.

⁴ 5 million Iraqi orphans, anti-corruption board reveals English translation of Aswat Al Iraq newspaper December 15, 2007

⁵ ^ "Iraq: no let-up in the humanitarian crisis" (PDF). [http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/iraq-report-170308/\\$file/ICRC-Iraq-report-0308-eng.pdf](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/iraq-report-170308/$file/ICRC-Iraq-report-0308-eng.pdf). Retrieved 2010-10-23.

This will relate to the first argument that the security measures have been successful, but you will want to go into more specific detail of terrorist attacks that have been prevented or stopped by the U.S. These can be arguments related to intelligence gathering, number of arrests made or even actual terrorist attacks stopped. There is evidence that explains how 9/11 security measures have stopped attacks, and much has been written about the increased efficiency of government bureaucracy due to the Patriot Act. The Patriot Act specifically has allowed much more communication and information sharing between intelligence agencies and this has led to more terrorist arrests and a greater knowledge about how terrorist networks are created and how they operate. Furthermore the Patriot Act has given the U.S. enormous amounts of information on terrorists themselves from wiretapping their conversations and searching through their business and personal records. This information can directly lead to preventing terrorist attacks and arresting terrorist leaders. You will want to argue that Patriot Act does not violate rights, is mainly applied to foreign nationals, and any domestic terrorist has engaged in treason and should not receive the rights afforded to citizens. Despite the legality of the Patriot Act, you will want to argue that it has been effective in its goal of sharing information throughout government and stopping terrorist leaders and attacks.

Another argument you will want to make is that the post 9/11 security measures have created a strong deterrent against terrorism, and that the War on Terror itself has a powerful deterrent effect. A deterrent is something that discourages or restrains someone from acting or proceeding, in this case the War on Terror deters terrorists from committing terrorist acts. The War on Terror has been extremely publicized, and the United States has made it very clear both domestically and internationally that they are committed to hunting down and prosecuting any and all terrorist activities. The events at Abu-Ghraib and Guantanamo Bay have demonstrated that U.S. forces will treat terrorists severely and without rights, as enemy combatants do not receive the rights or due process entitled to U.S. citizens. The fear of death, imprisonment, even torture are all strong and are effective in deterring terrorist acts and deterring people from becoming terrorists. The United States has said that if you are a terrorist they will hunt you down and kill you, and this is enough reason for many to stay away from terrorism, even those who may have been inclined to sympathize with terrorists to begin with. There are many studies out there that examine the deterrent effect of the War on Terror, and while it may be difficult to measure, it is certain that the War on Terror has deterred some terrorist attacks and some individuals from becoming terrorists.

C. The Social Contract

The PRO debater will want to argue that the reason that government was created in the first place was for security and thus protecting its citizens should be the first priority of any government. The Social Contract is an agreement between all members of society and their

government that as members of society we will give up certain freedoms and rights in exchange for protection and security. The idea of the Social Contract was popularized by Jean-Jacques Rousseau and is in some ways an explanation for how our society formed and where rights come from. Social Contract theorists will argue that protection and security is the main governmental responsibility of the contract, and that governments ought to prioritize the safety of their citizens first to fulfill their side of the contract. While rights may be important in every society, they are not as important as security since that is the state's main function and because rights cannot exist without a protected state. Furthermore, the Social Contract is an agreement between a government and its own citizens, and many authors will claim that a state has no other obligations outside of its own citizenry. Thus if the CON side argues about rights violations and death overseas, then this does not matter as the U.S. is only obligated to protect its own citizens and noncitizens do not have the same rights. Under the Social Contract the U.S. is only obligated to protect its own citizens, and their security should be the state's highest priority. This would justify all of the 9/11 security measures including the Patriot Act and the War on Terror.

D. Democratic Peace Theory

Democratic Peace Theory is a popular theory in international relations and affairs political science that argues that democratic nations, rarely, or even never, go to war with one another.

Democratic Peace Theory has been written about extensively and is one of the more accepted international relations theories in political science. The argument can be proven both empirically and analytically, as no "true" democracies have ever gone to war with each other. One reason is that democratic leaders are subject to elections, and voters generally do not like to vote for war or for an incumbent who supports war. This may give politicians incentives to seek alternatives to war if they know they must face an election and the populace is not supportive of the war. As media coverage becomes more extensive and can show the catastrophes of war within our homes, this is more likely to give voters distaste for war as well. Furthermore democracies have traditionally found non-democracies more unpredictable and more threatening, and are more likely to go to war with a non-democratic state than a democratic one they feel they can discuss their problems with. Finally democratic states have traditionally had better and more stable economies, and thus have stronger economic incentives not to go to war, and more to lose should war occur. You'll want to argue that the post 9/11 security measures, particularly the wars in Afghanistan and Iraq have eliminated rogue leaders and planted the seeds of democracy. If both Iraq and Afghanistan become democratic states, and you can argue they are certainly more democratic now than they were 10 years ago, then it is more likely we will achieve long standing peace and stability in the Middle East and this will probably be the greatest impact in the round. Additionally, Afghani and Iraqi citizens have already received more rights than they have ever had due to their democratic governments. This is especially true with gender rights.

Part 3: CON Strategies

A. Rights Violations

You will want to argue that the rights violations associated with the post 9/11 security measures all outweigh any security that might have been achieved from the violations. Rights are entitlements, and all humans are born with certain inalienable rights that cannot be violated. The United States government was created in a response to tyrannical British rule and rights have always been necessary to check abuses of power and government such as the rights violations that have occurred post 9/11. Citizens and non-citizens alike have had their rights violated in the name of security, and these violations have been both unjustified and unconstitutional. The rights to privacy, the right of association, the rights of due process, even the right to life have all been violated by the U.S. government in the name of the War on Terror. You can make the argument that these rights violations are inherently bad as rights are what give our lives meaning and choice, and that freedom is more valuable than life itself. You can also make a legal based argument that these rights violations are directly in violation with the U.S. constitution and that the U.S. government is acting illegally on a daily basis. You will find many authors and legal scholars that claim the Patriot Act itself is unconstitutional, and breaches a number of privacy and due process rights outlined in the Constitution. Moreover the rights violations associated with war are often the most devastating, and if the wars in Afghanistan and Iraq are part of the strategy to reduce terrorism in the Middle East, then those wars have caused the most severe rights violations in the post 9/11 world. The death and destruction caused in both Afghanistan and Iraq is most likely outweighed by any terrorist death that could have most likely been achieved without violating rights.

B. Terrorist Backlash

Osama bin Laden claimed that the reason for the September 11 attacks was partly due to the United State's presence in the Middle East. Many terrorists see the United States as a powerful hegemon that attempts to force its ideas and policies on the rest of the world. The U.S. has military bases and personnel all over the world, and is involved at all levels of international policy making. There is no country in the world currently with such a powerful international presence, and America remains a lone superpower at the moment. One can argue that America should use its position in the world for good, rather than starting wars for unsubstantiated reasons and hunting down potential terrorists. Furthermore because the U.S. is viewed as a hegemon, there will always be those who threaten its interests and citizens. If 9/11 occurred because of our presence in the Middle East, then you should argue it is likely that more terrorism will occur if we continue to stay in the Middle East fighting wars and violating rights. You can argue that America's international policies and rights violations will eventually cause more terrorism in the

long run as terrorists will continue to resent U.S. action. There is also evidence available that even though we have prevented more attacks since 9/11, the number of attempted terrorist attacks has increased dramatically. The CON will want to argue that the War on Terror has caused even more terrorism, and that the only way to stop terrorists from attacking our country is to stop attacking theirs.

C. International Relations

The United States' actions after September 11, 2001 did much to damage our reputation in the international political arena, as well as the United States' reputation among the rest of the world. While many nations pledged their support after the 9/11 attacks, other nations were much more reserved about the War in Afghanistan and many were very opposed to the War in Iraq. A lot has been written about the U.S. reaction in the months after September 11, but it is clear that the United States acted quickly and decisively, most likely without much consideration as to the future of the War on Terror or the wars in Afghanistan and Iraq. Much has been criticized about the United States' decision to invade Afghanistan less than a month after the attack, and most international scholars objected to the unilateral actions of America. Many felt that terrorism was an international issue and the U.S. did not have the right to invade the Middle East based on presumptions and unreliable intelligence. These criticisms were further exacerbated when the United States decided to invade Iraq, particularly because the United Nations had become involved. Many nations were opposed to the U.S. invasion of Iraq, and had desired a bilateral solution to the problem as well as more time for Hans Blix and his investigators to find weapons of mass destruction. The U.S. was certain that WMDs did exist in Iraq, and decided to invade anyways despite the U.N. and several major nations' objections. This hurt the United States' international standing because it demonstrated that the U.S. did not care to reach international compromise and would do as it wanted. When the U.S. found no WMDs after invading Iraq, this only confirmed critics' claims that the U.S. only invaded Iraq for political and economic gain. Probably most damaging was the fact that the U.S. refused to listen to or negotiate with other nations when it came to deciding to go to war. This unilateral action damaged our relationships with almost every other country and certainly hurt our reputation and standing in the international political arena. The CON will want to argue that we are living in an increasingly globalized and international world, and it is necessary for the United States to be able to represent its interests effectively in international politics. The loss of international political capital due to the wars in Afghanistan and Iraq could cause untold damage that we may not be able to fully understand for generations. The impacts here may be that the United States can no longer effectively achieve its goals or protect its citizens in international politics, and more devastating impact is that the United States is no longer an effective negotiator or mediator for peace as we have lost reputation and respect internationally.

AFFIRMATIVE EVIDENCE

THE CONVENTIONAL WISDOM THAT THE PATRIOT ACT DRAMATICALLY EXPANDED GOVERNMENT SURVEILLANCE POWERS IS INCORRECT

Orin S. Kerr [Associate Prof., George Washington University Law School], "Internet Surveillance Law After The USA Patriot Act: The Big Brother That Isn't," *Northwestern University Law Review* 97:607 (2003).

When we focus on the Internet surveillance provisions that passed into law, however, it becomes clear that the popular understanding of the Patriot Act is substantially wrong. The Patriot Act did not tilt the balance between Internet privacy and security in favor of security. Most of the Patriot Act's key changes reflected reasonable compromises that updated antiquated laws. Some of these changes advance law enforcement interests, but others advance privacy interests, and several do both at the same time. None challenged the basic legal framework that Congress created in 1986 to protect Internet privacy. Studying the Internet surveillance provisions of the Act suggests that the media portrayal of the Patriot Act as "extraordinary" and "panicky legislation" has little in common with the law Congress actually enacted.

BASIC INFORMATION ABOUT THE SENDER AND RECEIVER OF COMMUNICATIONS OVER A NETWORK IS NOT GENERALLY PROTECTED UNDER 4TH AMENDMENT BECAUSE PEOPLE FORFEIT THEIR REASONABLE EXPECTATION OF PRIVACY WHEN DISCLOSING SUCH INFORMATION TO A THIRD PARTY

Orin S. Kerr [Associate Prof., George Washington University Law School], "Internet Surveillance Law After The USA Patriot Act: The Big Brother That Isn't," *Northwestern University Law Review* 97:607 (2003).

Most discussions of the rules that govern government surveillance focus on the Fourth Amendment and the "reasonable expectation of privacy" 83 test. In the case of Internet privacy law, however, the real action tends to be in the legislature, not the courts. The explanation for this lies in the narrow way that the courts have interpreted the reasonable expectation of privacy test in communications networks. While many questions remain, the existing cases appear to have left Congress with relative liberty to create the set of rules it thinks best. To a surprising extent, Internet privacy is statutory privacy. Under current law, Congress creates the primary rules that regulate law enforcement surveillance of the Internet, rather than the courts. 84 The cases most responsible for the fairly narrow Fourth Amendment protections in communications networks hold that an individual has no reasonable expectation of privacy in information revealed to third parties. 85 I will call this mechanism the disclosure principle: information disclosed to a third party does not receive Fourth Amendment protection. If I tell you a secret, the government cannot violate my reasonable expectation of privacy by persuading you to disclose my secret to the police. 86 While such an expectation of privacy might seem reasonable in a practical sense – a reasonable person might expect you not to disclose the secret – the courts have concluded that it is not "reasonable" in a constitutional sense. 87

The disclosure principle carries tremendous significance when considering how the Fourth Amendment applies to communications networks. Communications networks require partial (and sometimes total) disclosure to the network provider to send communications. Envelope information provides a clear example. Envelope information is simple the "to" and "from" information offered to the network provider to help the provider deliver the contents. For example, the postal service must read the "to" address on a letter to deliver it properly. Similarly, a caller necessarily discloses the phone number he is dialing to the phone company when he communicates it to the phone company so the company can complete the call.

EVEN BEFORE THE PATRIOT ACT PEN REGISTER LEGISLATION WAS WIDELY APPLIED TO THE INTERNET. THIS IS ACTUALLY MORE PROTECTIVE OF PRIVACY THAN THE ALTERNATIVE

Orin S. Kerr [Associate Prof., George Washington University Law School], "Internet Surveillance Law After The USA Patriot Act: The Big Brother That Isn't," *Northwestern University Law Review* 97:607 (2003).

So did the pen register laws apply to the Internet? The Justice Department believed they did and that the pen register laws regulated both Internet email and packet-level envelope surveillance just as they did telephone envelope surveillance. 124 In fact, Justice Department practice had embraced the pen register statute for several years as the means of conducting Internet envelope surveillance. Federal judges had at least implicitly agreed: judges had signed pen register orders authorizing Internet email and packet surveillance hundreds, if not thousands, of times in the years leading up to the Patriot Act. 125 While some magistrate judges has asked prosecutors whether the statute applied to the Internet, the judges always satisfied themselves that it did and signed the order. 126 One magistrate judge in Los Angeles had also written an unpublished order agreeing that the statute applied to the Internet: "Although apparently not contemplated by the drafters of the original statute," Judge James McMahon wrote, "the use of a pen register order in the present situation is compatible with the terms of the statute." 127 The text remained uncertain, but as a matter of law enforcement practice, it was generally understood that the pen register laws applied to the Internet. 128

Notably, the government's conclusion that the pen register statute applied to the Internet created a double-edged sword. Without the pen register statute, the government could conduct envelope surveillance without a court order. The government or anybody else could wiretap the Internet and collect any noncontent information it wished without restriction. 129 Applying the pen register laws to the Internet denied the government the power to conduct envelope surveillance without a court order, which limited government power and blocked private entities from conducting prospective envelope surveillance, thus protecting privacy. At the same time, applying the pen register statute to the Internet benefited law enforcement by giving the government a relatively easy way of obtaining orders compelling ISPs to conduct prospective envelope surveillance on the government's behalf. Absent that authority, the government would need to install monitoring devices itself, rely on the voluntary cooperation of ISPs, or try to use other laws requiring a higher factual showing than the pen register laws to obtain court orders compelling ISPs to conduct envelope surveillance. 130

THE PATRIOT ACT'S EXTENSION OF PEN REGISTER LAWS TO THE INTERNET ACTUALLY PROTECTS PRIVACY

Orin S. Kerr [Associate Prof., George Washington University Law School], "Internet Surveillance Law After The USA Patriot Act: The Big Brother That Isn't," *Northwestern University Law Review* 97:607 (2003).

As demonstrated earlier, the Patriot Act's modifications of the pen register statute to include all "dialing, routing, addressing, or signaling information" proved to be one of the most controversial provisions in the Act. The media widely interpreted this change as a sweeping and unjustified expansion of law enforcement authority. To be fair, some of these reactions derived from the initial DOJ proposal, which lacked Senator Leahy's clarification that the changes to the scope of the pen register statute did not alter the scope of the Wiretap Act (although as I will explain shortly, it is unlikely that such a clarification was necessary). But even so, the criticisms of the pen register amendment prove surprisingly weak.

First, the criticisms ignore the fact that the pen register statute is primarily a privacy law. The law protects envelope information, making it a federal crime to collect envelope information without a court order. 151 If the pen register statute did not apply to the Internet, then email and packet envelope surveillance would be totally unregulated by federal privacy law. In such a world, the government would be allowed to conduct envelope surveillance of the entire country's emails and Internet communications without a court order, or without even any prior authorization within the Executive Branch. Even more broadly, any private party would be allowed to do the same.

THE PATRIOT ACT'S EXPANSION OF PEN REGISTER LEGISLATION TO THE INTERNET MERELY CODIFIED ALREADY EXISTING LAW

Orin S. Kerr [Associate Prof., George Washington University Law School], "Internet Surveillance Law After The USA Patriot Act: The Big Brother That Isn't," *Northwestern University Law Review* 97:607 (2003).

The criticisms of the pen register amendments also missed the mark because they failed to recognize that the changes codified a decade's worth of preexisting practice that had matched Internet privacy protections to telephone privacy protections. The Justice Department had been obtaining pen register orders to conduct envelope surveillance for years, and the new text explicitly recognized and approved the practice. The legislative change did not expand any authority: at most, the change merely overruled Magistrate Judge Trumbull's unpublished order. 155 Although styled a "change" in the law by its critics, the pen register amendments merely reaffirm the status quo. In itself this provides no reason to celebrate the amendments, as the status quo may be inadequate. However, the fact that the change reaffirms longstanding practice seems to undercut claims that the change dramatically expanded law enforcement powers.

EXPANSION OF PEN REGISTER STATUTES TO THE INTERNET AFFORDS THE SAME PROTECTION PROVIDED TO PHONE CALLS AND MORE PROTECTION THAN LETTERS

Orin S. Kerr [Associate Prof., George Washington University Law School], "Internet Surveillance Law After The USA Patriot Act: The Big Brother That Isn't," *Northwestern University Law Review* 97:607 (2003).

Further, applying the pen register laws to the Internet matched the regulation of the Internet to the regulation of the telephone network and exceeded the protection that the law provides to similar surveillance of the postal network. After the Patriot Act, envelope surveillance of the telephone and the Internet requires a pen register order, whereas envelope surveillance of postal mail still requires no court order whatsoever. 156 Although some believe that the standards for Internet envelope surveillance should be more strict than their analogues in the telephone context 157 – a question analyzed in the next Part – at the very least the Patriot Act imposes same standard for analogous information in the case of the telephone, and more privacy protection for analogous information in the case of the postal network.

THE PATRIOT ACT ACTUALLY EXPANDS PRIVACY PROTECTIONS ASSOCIATED WITH PERMISSIBLE DISCLOSURE OF INFORMATION OBTAINED THROUGH PEN REGISTER WIRETAPS

Orin S. Kerr [Associate Prof., George Washington University Law School], "Internet Surveillance Law After The USA Patriot Act: The Big Brother That Isn't," *Northwestern University Law Review* 97:607 (2003).

Criticisms of the pen register amendments also failed to note that the negotiations over the various bills that led to the Patriot Act actually added privacy protection to the pen register statute that prohibit the disclosure of information obtained through envelope surveillance. 158 Prior to the Patriot Act, government officials could publish or leak information obtained by use of a pen register or trap and trace device. 159 During the congressional negotiations, pro-privacy legislators managed to insert language that limits the disclosure of information obtained through prospective envelope surveillance of Internet and telephone communications to disclosures made "in the proper performance of the official functions of the officer or governmental entity making the disclosure." 160 Any other disclosure is prohibited. 161 Although the exact contours of this prohibition remain unclear, the new provision bolsters the privacy protections that the pen register statutes offer to envelope information.

THE LINK BETWEEN THE PATRIOT ACT AND THE USE OF THE CARNIVORE SURVEILLANCE SYSTEM IS TENUOUS AT BEST

Orin S. Kerr [Associate Prof., George Washington University Law School], "Internet Surveillance Law After The USA Patriot Act: The Big Brother That Isn't," *Northwestern University Law Review* 97:607 (2003).

Opponents of the Patriot Act allege that the Act encourages the use of Carnivore. As the analysis above indicates, this is an odd point of criticism since Carnivore is generally more privacy enhancing than other less sophisticated packet sniffers in everyday use at ISPs. But even on its face, the criticism rings hollow.

The view that the Patriot Act furthers the use of Carnivore is based largely on a faulty logical premise. The premise is that because Carnivore provides a means of conducting Internet surveillance, a law that appears to further the government's ability to conduct the use of Internet surveillance must also further the use of Carnivore. The problem is that Carnivore is merely one particular tool among many that could be used to conduct electronic surveillance, and there is no reason to think that the Patriot Act encourages the use of Carnivore as compared to any other tool (in fact, as we shall see shortly the opposite is true).

As a result, the statement that the Patriot Act encourages the use of Carnivore is akin to saying that a new highway bill furthers the use of Volvos. Yes, some cars on the road are Volvos. Yes, a new law that helps the highway system may eventually encourage more driving, some of which presumably will be done behind the wheel of Volvos. But the connection between the highway bill and a particular make or model of car is tenuous, as there are hundreds of different cars that can be driven, and there is no reason to think that a highway bill would encourage the use of Volvos more than any other car. Tying the Patriot Act to the increased use of Carnivore rests on similarly weak logic.

THE PATRIOT ACT ACTUALLY INCREASES THE PRIVACY PROTECTIONS ASSOCIATED WITH THE USE OF CARNIVORE SURVEILLANCE SOFTWARE

Orin S. Kerr [Associate Prof., George Washington University Law School], "Internet Surveillance Law After The USA Patriot Act: The Big Brother That Isn't," *Northwestern University Law Review* 97:607 (2003).

Notably, the Patriot Act does include one amendment that is designed to address Carnivore. However, this amendment is actually a pro-privacy law, designed to monitor Carnivore by imposing a reporting requirement on direct prospective surveillance of the Internet by law enforcement. 240 The reporting requirement has been codified at 18 U.S.C. § 3123(a)(3) and requires a law enforcement agency to file a detailed report whenever it installs its own surveillance device on an ISP available to the public pursuant to a pen register order. 241 The report must identify "any officer or officers who installed the device and any officer or officers who accessed the device to obtain information from the network," 242 "the date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device is accessed to obtain information," 243 "the configuration of the device at the time of its installation and any subsequent modification thereof," 244 and "any information which has been collected by the device." 245 The provision was added to the Patriot Act at the insistence of House Majority Leader Dick Armey in an effort to increase the judicial review of the use of Carnivore as a way of implementing pen register orders. 246 Contrary to reports that the Patriot Act unleashed Carnivore, the Patriot Act actually introduced measures that specifically monitor and restrict its use. 247

THE PATRIOT ACT'S CREATION OF A TRESPASSER EXCEPTION TO THE WIRETAP ACT ACTUALLY ALIGNS THE LAW MORE CLOSELY WITH THE FOURTH AMENDMENT

Orin S. Kerr [Associate Prof., George Washington University Law School], "Internet Surveillance Law After The USA Patriot Act: The Big Brother That Isn't," *Northwestern University Law Review* 97:607 (2003).

The purpose of the computer trespasser exception was to carve out a narrow exception that would allow monitoring of hacker communications in some instances without disrupting an otherwise narrow reading of the consent exception. The proposed exception acted as a cross between the existing provider exception and consent exception: it would allow the government to intercept the communications of computer hackers who did not have authorization to use the network when the owner of the network consented to the surveillance. Conceptually, this aligned the Wiretap Act more closely to the Fourth Amendment. If we understand a hacker's communications as the virtual equivalent of a burglar inside the victimized network, 292 then a hacker has no reasonable expectation of privacy in his attack and the Fourth Amendment would not afford him any privacy rights against monitoring. 293 From the perspective of victims' rights, this also matched victims' options online and off. A victim of a burglary in his home can consent to monitoring of a burglar there. Similarly, a victim of hacking should be able to consent to monitoring of a hacker within its network. 294

THE PATRIOT ACT'S TRESPASSER EXCEPTION TO THE WIRETAP ACT ACTUALLY NARROWS THE SCOPE OF GOVERNMENT WIRETAPPING

Orin S. Kerr [Associate Prof., George Washington University Law School], "Internet Surveillance Law After The USA Patriot Act: The Big Brother That Isn't," *Northwestern University Law Review* 97:607 (2003).

Ironically the trespasser exception that has been condemned for expanding the scope of wiretapping in open-ended ways 311 may have actually *narrowed* the scope of government wiretapping. By implicitly rejecting the broad reading of the consent exception and a narrow reading of contents, the trespasser exception may thwart readings of the Wiretap Act that would radically minimize the protections of the Wiretap Act. No matter how broadly the trespasser exception may be viewed, its impact on other provisions of the Wiretap Act likely dwarfs the impact of the exception itself. And that impact will expand privacy protections, not reduce them.

POST-9/11 SECURITY MEASURES HAVE FOILED AT LEAST 23 TERRORIST PLOTS AGAINST THE UNITED STATES

Jena Baker McNeill [Policy Analyst for Homeland Security, Heritage Foundation] and James Jay Carafano [Ph.D., is Assistant Director of the Davis Institute and Senior Research Fellow for National Security and Homeland Security], "Terrorist Watch: 23 Plots Foiled Since 9/11," *Executive Summary Backgrounder*, [published by the Heritage Foundation] no. 2294, July 2, 2009.

Since the 9/11 terrorist attacks, 23 terrorist plots against the United States have been foiled. This report updates a November 2007 report from the Heritage Foundation that described 19 plots that had been foiled to date since 9/11. Less than two years later, the U.S. has foiled four more plots aimed at Americans. While some trials have ended in mistrial and charges against some suspects were dropped, significantly more individuals have been convicted and sentenced for their crimes.

These victories make the case for continued U.S. vigilance against terrorism around the globe. While these particular attacks have been disrupted, the threat remains. The Department of Homeland Security (DHS) and Congress should not construe the successes over the past eight years as a signal to reduce U.S. counterterrorism efforts.

America is truly in a long war against terrorism. To win this war, the U.S. must constantly adapt to ever-changing terrorist threats. Congress and the DHS will need to work together to provide continued support for terrorism-fighting tools, to increase information sharing and collective security efforts around the globe, and to expand vital law enforcement partnerships with local and state law enforcement and cooperation with the governments of other countries. These relationships have enabled the U.S. to disrupt the flow of money and resources to terrorist groups.

THE UNITED STATES CANNOT DEFER RESPONSIBILITY FOR PROSECUTING TERRORISM TO THE INTERNATIONAL COMMUNITY

Kenneth Anderson [Prof. of Law, Washington College Law School, American University], "What To Do With Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees At Guantanamo Bay Naval Base," 25 Harvard Journal of Law & Public Policy 591, 2001-2002.

Even if their motivation is self-interest, allowing the United States to take the decisions and bear the security risks is morally correct. Whatever the outcome of the grand argument between liberal internationalism and democratic sovereignty, it is both the privilege and the awful responsibility of the United States to deal with those alleged to have planned or participated in the September 11 attacks. The tragedy certainly involved universally reprehensible crimes, such as making civilians both the means and object of attack. But fundamentally, September 11 was *not* an attack upon the whole world; it was an attack upon the United States, its territory, property, and people. A democratic polity owes its members and citizens a good faith effort to protect them and do justice on their behalf, and it would be morally wrong for the United States, in a misguided attempt to provide "universal" justice through supposedly "universal" institutions, to seek to avoid this burden and refer it to international institutions.

Nor should the United States be swayed by arguments that only international bodies can provide "impartiality" and the appearance of "impartial" justice. Even accepting for argument's sake that international tribunals could provide more impartial justice than United States courts would, the United States as a democratic polity owes its citizens, its people, and particularly those who died and lost loved ones, justice according to *United States* traditions. It owes *our* people *our* justice, and should see that our justice is done for those who have attacked us. This principle is the genuine lesson of the Nuremburg Trials, not the anodyne universalism of liberal internationalists. It would have been morally contemptible for the Second World War Allies to have proclaimed, in a fit of political correctness, that they should turn the judgment of the Nazi leaders over to those countries which were neutral and impartial to have them tried in a genuinely unbiased manner.

TRYING TERRORISTS IN U.S. DISTRICT COURTS CONTINUES THE INEFFECTIVE POLICY OF REGARDING TERRORISM AS A PURELY CRIMINAL MATTER

Kenneth Anderson [Prof. of Law, Washington College Law School, American University], "What To Do With Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees At Guantanamo Bay Naval Base," 25 Harvard Journal of Law & Public Policy 591, 2001-2002.

If international tribunals are both an unrealistic and morally undesirable dream, trials of suspected terrorists in ordinary U.S. district courts also carry significant moral and practical downsides. For one, they merely extend the evident failure of U.S. policy over the past decade in dealing with terrorism against U.S. targets: the 1988 Lockerbie, Scotland plane explosion; the 1993 World Trade Center bombing; the 1996 Khobar Towers attack against U.S. military personnel in Saudi Arabia; the 1998 U.S. embassy bombings in Africa; and finally the 2000 attack on the U.S.S. Cole. American policy has been to regard the problem of terrorism against American targets, whether at home or abroad, as essentially a criminal matter, a question of long-arm criminal jurisdiction, under the investigation of the FBI, seeking extradition of suspects for prosecution by regular Justice Department prosecutors in ordinary U.S. district court. The CIA, notably, has been far less important than the FBI, and the Federal effort has been concentrated on solving past cases and bringing suspects in them to trial rather than taking intelligence actions aimed at preventing or deterring future action.

USING ORGANIZED CRIME AS A MODEL FOR DOMESTIC PROSECUTION OF SUSPECTED TERRORISTS RESTS ON FAULTY ASSUMPTIONS

Kenneth Anderson [Prof. of Law, Washington College Law School, American University], "What To Do With Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees At Guantanamo Bay Naval Base," 25 Harvard Journal of Law & Public Policy 591, 2001-2002.

The concerns about the effectiveness and practicality of civilian courts for trying terrorist suspects thus rest on its poor record, especially when one considers the scope of the attacks and their increasing audacity over time. The root sources of its failure is the process' alleged virtue – the use of models drawn from the fight against organized crime. Organized crime and drug smuggling are, however, essentially problems stemming from material greed. In stark contrast, the motives of Al Qaeda are apocalyptic and ideological. As Ruth Wedgwood observes:

Perhaps it is only coincidence that the World Trade Center towers toppled the day before Al Qaeda defendants were due to be sentenced for the earlier bombings of East Africa embassies – in a Federal courthouse in lower Manhattan six blocks away. But certainly before September 11 no one imagined the gargantuan appetite for violence and revenge that bin Laden has since exhibited. Endangering America's cities with a repeat performance is a foolish act. 36

U.S. FEDERAL COURTS ARE ILL-EQUIPPED TO TRY TERRORISM SUSPECTS BECAUSE OF THE LIMITATIONS OF EVIDENCE RULES, THE PROBLEM OF COMPROMISING INTELLIGENCE SOURCES, AND THE DIFFICULTY IN KEEPING PARTICIPANTS SAFE

Kenneth Anderson [Prof. of Law, Washington College Law School, American University], "What To Do With Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees At Guantanamo Bay Naval Base," 25 Harvard Journal of Law & Public Policy 591, 2001-2002.

What limitations of the U.S. federal courts in trying cases of these kinds? First, there are evidentiary limitations on what can be introduced in court. Unlike European criminal courts and the Yugoslavia tribunal – the darlings of international human rights advocates who are now complaining of the Bush Administration's plans under the Military Order – hearsay statements of probative value cannot be introduced in U.S. district court. Thus, as Wedgwood says, "bin Laden's telephone call to his mother, telling her that 'something big' was imminent, could not be entered into evidence if the source of information was his mother's best friend." 37 Second, there are limitations on what the intelligence community, concerned with possible future attacks rather than punishing past attackers, are willing to publish in open court. The 1980 Classified Information Procedures Act gives rules on using secret information at trial, but trials must remain open. Similarly important is information that is non-classified, but of great interest to terrorists, if pushed for example over the Internet – an example might be the capture of a terrorist procedures manual, public knowledge of the capture of which would then allow terrorist groups to make adjustments. Another example might be the publication, as took place in the 1993 World Trade Center bombing, of extensive engineering data on the construction of the towers; such information is public but not easy to obtain, unless, for example, it is brought into open court in a trial. The third reason is the long-term protection of participants, in a setting in which, because the perpetrators are driven by ideology rather than money, revenge may be considered a sacred, and hence permanent, obligation.

TERRORISTS ARE NOT ANALOGOUS TO DOMESTIC CRIMINALS BECAUSE THEY COME FROM OUTSIDE THE POLITICAL COMMUNITY

Kenneth Anderson [Prof. of Law, Washington College Law School, American University], "What To Do With Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees At Guantanamo Bay Naval Base," 25 Harvard Journal of Law & Public Policy 591, 2001-2002.

This approach is seriously mistaken. The ability to prosecute domestic crime, and the necessity of providing constitutional standards of due process, including the extraordinarily complex rules of evidence, suppression of evidence, right to counsel, and the rights against self-incrimination have been developed *within* a particular political community, and fundamentally reflect decisions about rights within a fundamentally domestic, democratic setting in which all of us have a stake in both sides of the equation, as prosecutors and prosecuted, because we are part of the political community which must consider both individual rights and collective security.

It is a system, in other words, that fundamentally treats crime as a *deviation from* the domestic legal order, not fundamentally an *attack upon* the very basis of that order. Terrorists who come from outside this society, including those who take up residence inside this society for the purpose of destroying it, cannot be assimilated into the structure of the ordinary criminal trial. True enough, citizenship alone is enough to qualify a person to be tried for attacks upon that order, as in the case of a domestic terrorist such as Timothy McVeigh. But, in fact, the domestic legal system strains to acknowledge the awfulness of what someone like McVeigh has done: his crimes are *not* reducible to so many murders, so many injured victims, so much destruction of property, and so on in the way one thinks of ordinary criminals. The actual charges available to prosecutors in his trial, and hence the conduct of the trial itself, in a curious but profound way, missed the point of his act, which was not merely to murder people, but to make war upon the United States. McVeigh, like bin Laden and Al Qaeda, undertook not a deviation from the domestic order, but an attack upon it. 39 McVeigh's membership in the political community through citizenship was enough to grant him trial as though his acts were merely crimes and not attacks, but the moral reality is that McVeigh had transformed himself into a true outsider, not merely a deviant. He was not merely a criminal, but also an *enemy*. Al Qaeda has the same status – but the U.S. district courts are, by constitutional design, for criminals and not for those who are at once criminals *and* enemies. U.S. district courts are eminently unsuited by practicality but also by concept for the task of addressing those who planned and executed September 11.

THE CONSTITUTION PROTECTS U.S. CITIZENS AS MEMBERS OF A PARTICULAR POLITICAL COMMUNITY

Kenneth Anderson [Prof. of Law, Washington College Law School, American University], "What To Do With Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees At Guantanamo Bay Naval Base," 25 Harvard Journal of Law & Public Policy 591, 2001-2002.

First, the U.S. Constitution is not a document for the entire world. It is not a pact with the world, or a pact among people generally in the world. It is a document as among the members of a particular political community, and its burdens and benefits accrue to them. Particularly those in the international human rights community who now complain that the United States does not propose to extend full constitutional protections to categories of non-U.S. citizens on the ground that these protections are somehow required by notions of universal justice had due process seem to forget that this same human rights community has been careful to construct international tribunals, such as the Yugoslavia tribunal, which make no pretense of adhering to America's far more rigorous notions of procedure, due process, and evidentiary rules. Even in substantive law, too, the international human rights community has been more than happy to accept international standards on such things as incitement to racial hatred and hate speech that would clearly violate the First Amendment, on the ground that the U.S. Constitution does not and need not apply. Human rights activists cannot have it both ways.

POLITICAL COMMUNITY CONSISTS OF BOTH CITIZENSHIP AND TERRITORY. CRIME COMMITTED BY NON-CITIZENS OR ABROAD DO NOT IMPLICATE THE STRONGEST CONSTITUTIONAL PROTECTIONS

Kenneth Anderson [Prof. of Law, Washington College Law School, American University], "What To Do With Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees At Guantanamo Bay Naval Base," 25 Harvard Journal of Law & Public Policy 591, 2001-2002.

Second, the fundamental parameters of the United States political community are twofold: citizenship and territory. The case for full U.S. constitutional protection is strongest when dealing with U.S. citizens on the territory of the United States – even including McVeigh – while the weakest case is a non-U.S. citizen on foreign territory, such as non-citizen Al Qaeda suspects captured in Afghanistan. Even the McVeighs deserve U.S. constitutional protections in regular U.S. courts (and have received them), while aliens abroad have not: this is all ordinary jurisprudence, and is reflected in the Military Order insofar as only (certain) aliens may be tried by military commission. The questions arise in the mixed cases.

UNDER INTERNATIONAL LAW TERRORISTS ARE NOT ENTITLED TO THE SAME PROTECTIONS AS PRISONERS OF WAR

Kenneth Anderson [Prof. of Law, Washington College Law School, American University], "What To Do With Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees At Guantanamo Bay Naval Base," 25 Harvard Journal of Law & Public Policy 591, 2001-2002.

The point, however, is that the terrorists and organization which planned and executed the September 11 attacks do not fit the definition of combatants entitled to receive POW benefits. Apart from the requirements of carrying arms openly and bearing a fixed distinctive sign visible at a distance, and apart from any theoretical controversy over the extended definition of combatant under Protocol I not accepted by the United States, it is patently clear that the September 11 terrorists fail the requirement of conducting their operations in accordance with the laws and customs of war. They failed this requirement, of course, by using civilians as both the means and targets of their attacks, among other things.

GUANTANAMO DETAINEES HAVE BEEN TREATED WELL ABOVE THE STANDARDS REQUIRED BY THE THIRD GENEVA CONVENTION

Kenneth Anderson [Prof. of Law, Washington College Law School, American University], "What To Do With Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees At Guantanamo Bay Naval Base," 25 Harvard Journal of Law & Public Policy 591, 2001-2002.

Notwithstanding the shrillness of the criticism, there appears to be little if any substance to the complaints about treatment of the detainees. The detainees, according to all the accounts of journalists and visitors to the camp of which I am aware, including a U.S. congressional delegation, 67 are receiving a quality of care, in the way of housing, food, medical attention, and religious requirements, that far exceeds the standard of the Third Geneva Convention, even assuming that it applied. As a British journalist who visited the Guantanamo facility has said, "There are 161 medical staff treating the [158] detainees. I have talked to surgeons who told me that hardened fighters suffering from shrapnel and bullet wounds had thanked them after being operated on." 68

TRYING TERRORISM SUSPECTS WITH THE LOWER PROCEDURAL REQUIREMENTS OF A MILITARY TRIBUNAL IS CONSISTENT WITH THE THIRD GENEVA CONVENTION

Kenneth Anderson [Prof. of Law, Washington College Law School, American University], "What To Do With Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees At Guantanamo Bay Naval Base," 25 Harvard Journal of Law & Public Policy 591, 2001-2002.

The question then remains of what constitutes a "competent tribunal" within the meaning of the Third Geneva Convention. At that point, the legal analysis re-joins that already discussed with respect to military commissions. A competent tribunal need *not* be a tribunal convened with full POW protections under the Third Geneva Convention. The argument that providing provisional POW protections to a detainee in respect of treatment further means that a "competent tribunal" must also be a court martial under the Third Geneva Convention itself fatally ignores the specific provisions of Article 75, which – drafted some thirty years after the 1949 Conventions and fully cognizant of them – affirmatively establish a lower standard of process. To require that every hearing be under the Third Geneva Convention POW standard would render pointless the less procedures specifically established under Article 75 and customary law for dealing with those accused of abusing their civilian status, such as spies, saboteurs, and other illegal combatants. Rather, all that is required is what has already been stated under Article 75. It is a procedure which does not require an open trial, does not require counsel, and does not even require an appeals process although, as earlier stated, I believe the United States ought to provide for one.

**MILITARY COMMISSIONS HAVE HISTORICALLY BEEN ESTABLISHED BY THE
EXECUTIVE BRANCH TO TRY PEOPLE WHO FALL OUTSIDE THE JURISDICTION OF THE
UNIFORM CODE OF MILITARY JUSTICE**

Daryl A. Mundis [J.D. Columbia University, Senior Trial Attorney at The Hague, lead prosecutor at the International Criminal Tribunal for the former Yugoslavia], "The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts," *The American Journal of International Law*, Vol. 96, No. 2. (Apr., 2002), pp. 320-328.

Courts-martial are one permissible forum for prosecuting prisoners of war, although the Uniform Code of Military Justice (U.C.M.J.) 'limits the personal jurisdiction of courts-martial to members of the U.S. military? prisoners of war,' and certain specified categories of civilians." Because unlawful combatants, saboteurs, and spies, among others, are not subject to the jurisdiction of courts-martial, such persons have historically been prosecuted by military commissions, which have been utilized to close the gap that might otherwise preclude trial of these categories of alleged offenders. Although the legal basis for military commissions derives from the constitutional provisions conferring the power to wage war on Congress, it has historically left the establishment of such tribunals to the executive branch." Trial by military commission was used in World War 1113 and authorized (though not used) during the Korean war."

**POLLING SHOWS THAT PEOPLE BELIEVE THAT THE GOVERNMENT HAS MADE US
SAFER SINCE 9/11**

Karlyn Bowman and Andrew Rugg, "Americans and the Terrorism Threat 10 Years After 9/11," *The American* 31 Aug. 2011, n. pag. Web. 31 Aug 2011.

In a time when criticism of Washington is widespread, people are giving the Bush and Obama administrations, and the government generally, good marks for protecting the citizenry. Seventy-one percent, for example, said they had a great deal or a fair amount of confidence in the government to protect its citizens against future terrorist attacks, according to a 2011 CBS poll. Americans told the pollsters that the Bush administration made us safer, and that they believe that President Obama will keep us safe. Obama polls strongly on handling terrorism, and the death of Osama bin Laden strengthened his standing.

THE PUBLIC HAS SUPPORTED AND CONTINUES TO SUPPORT MAJOR POST-9/11 SECURITY MEASURES

Karlyn Bowman and Andrew Rugg, "Americans and the Terrorism Threat 10 Years After 9/11," *The American* 31 Aug. 2011, n. pag. Web. 31 Aug 2011.

Privacy concerns have not, however, eliminated the public's anxiety over safety and protection. Forty-seven percent told Pew pollsters in October 2010 that the government had not gone far enough to adequately protect the country, while 32 percent said it had gone too far in restricting civil liberties. Sixty-eight percent of those polled by ABC/The Washington Post in November 2010 said it was more important for the federal government to investigate threats even if it intrudes on privacy; 26 percent said it was more important not to intrude on privacy even if it limits the government's ability to investigate threats.

Americans support the airline security measures that have been adopted since 9/11. Seventy-seven percent told Gallup in 2006 that the new security measures at airports have been an effective part of the government's strategy to prevent terrorism. In a 2010 Quinnipiac poll, 86 percent supported new airport security measures even if they resulted in delays in air travel.

Polls show the public has wrestled with issues surrounding assassinations and torture. Unsurprisingly, sizable portions of the public have reservations about assassinations but most support their limited use. In a July 2009 Pew poll, 60 percent of respondents favored the CIA having a program to target senior Al-Qaeda leaders for assassination. Eighty percent told NBC/Wall Street Journal pollsters in May 2011 that killing instead of capturing Osama bin Laden was the right decision.

When it comes to torture, majorities generally oppose the practice. However, they do not want to rule it out completely. Around a quarter of Americans say that torture is "never justified" in Pew's long trend. A plurality of 45 percent told Fox interviewers in January 2009 that harsh interrogation techniques have probably saved American lives, while 41 percent did not think so. And while Guantanamo Bay remains controversial, majorities of Americans support the continued operation of the facility. In a March 2011 NBC/Wall Street Journal poll, 67 percent supported keeping the prison open. Majorities also supported the reauthorization of the Patriot Act and monitoring communications of potential terrorists without court approval.

As for Afghanistan, Americans did not shy away from the fight. All polls showed strong initial support for the war. To this day, when pollsters ask people whether taking the war to Afghanistan was the right or wrong thing to do, majorities say it was the right thing. In a June 2011 Pew poll, 57 percent said invading Afghanistan was the right decision. Thirty-five percent said it was the wrong decision.

POST-9/11 SECURITY HAS IMPROVED BY INCREASING COOPERATION BETWEEN LOCAL AND FEDERAL POLICE

Jonathan Walters, "Policing in the Post-9/11 Era," *Governing* 31 Aug. 2011, n. pag. Web. 31 Aug 2011.

That is the core of a dilemma faced by police departments today: They must determine how to defend against organized terrorism as well as the seemingly random acts of either criminal, crazy or just wildly disgruntled individuals. In the wake of 9/11, the focus of police departments swung sharply toward defending against organized terrorism. Metropolitan police departments started improving partnerships with federal agencies and gathering huge volumes of information based on the assumption that given the right raw data and their ability to analyze it well, law enforcement could head off organized terrorist attacks.

The most obvious manifestation of that approach -- one that was fueled by billions in federal dollars -- was the creation of "fusion centers." Nationally 72 fusion centers have been outfitted and staffed to promote the collection and sharing of intelligence among and between local, state and federal agencies. Fusion centers epitomize an approach to terrorism prevention that puts a premium on sucking in and sifting through massive amounts of information from all levels of law enforcement and other sources, formal and informal, as a way to stay ahead of terrorists.

Recent arrests of two suspected terrorists in the Seattle metro region are credited in part to Seattle's fusion center, after a tip was passed along from a man the two had approached about buying guns and grenades. "That information came to the attention of a detective assigned to the fusion center by the Seattle Police Department," said Seattle police Lt. Ron Leavell in a local news report.

INCREASING SECURITY MEASURES HAS NOT RADICALIZED THE AMERICAN-MUSLIM COMMUNITY

Rose French, "Survey: No growth in alienation or support for extremism among Muslim Americans," *Star Tribune* 30 Aug. 2011, n. pag. Web. 31 Aug 2011.

As the 10th anniversary of the 9/11 attacks approaches, a public opinion survey by the Pew Research Center finds no increased alienation or anger among Muslim Americans in response to concerns about home-grown Islamic terrorists, controversies about the building of mosques and other pressures on this high-profile minority group.

Nor does the new polling provide any evidence of rising support for Islamic extremism among Muslim Americans.

On the contrary, as found in the Pew Research Center's 2007 survey, Muslims in the U.S. continue to reject extremism by much larger margins than most other Muslim publics around the world, and many express concern about the possible rise of Islamic extremism.

Very few Muslim Americans -- just 1% -- say that suicide bombing and other forms of violence against civilian targets are often justified to defend Islam from its enemies; an additional 7% say suicide bombings are sometimes justified in these circumstances.

Fully 81% say suicide bombing and other forms of violence against civilians are never justified. Comparably small percentages of Muslim Americans express favorable views of al Qaeda, and the current poll finds more holding very unfavorable views of al Qaeda now than in 2007.

MUSLIM-AMERICAN SUSPICIONS OF ANTI-TERRORISM EFFORTS HAVE DECREASED SINCE 2007 EVEN THOUGH THEY HAVE EXPERIENCED SOME DISCRIMINATION

Rose French, "Survey: No growth in alienation or support for extremism among Muslim Americans," *Star Tribune* 30 Aug. 2011, n. pag. Web. 31 Aug 2011.

Since 2007, Muslim American views of U.S. efforts to combat terrorism have improved. Currently, opinion is divided – 43% say U.S. efforts are a sincere attempt to reduce terrorism while 41% do not. Four years ago, during the Bush administration, more than twice as many viewed U.S. anti-terrorism efforts as insincere rather than sincere (55% to 26%).

However, concerns about Islamic extremism coexist with the view that life for U.S. Muslims in post-9/11 America is difficult in a number of ways. Significant numbers report being looked at with suspicion (28%), and being called offensive names (22%).

And while 21% report being singled out by airport security, 13% say they have been singled out by other law enforcement. However, about the same percentage today as in 2007 say that life for Muslims in the U.S. has become more difficult since 9/11. The percentage reporting they are bothered at least some by their sense that Muslim Americans are being singled out for increased government surveillance also is no greater now than four years ago (38% vs. 39%).

Politically, Muslim Americans, who lean strongly Democratic, are much more satisfied than they were four years ago. Fully 76% approve of Barack Obama's job performance; in 2007, about as many (69%) disapproved of the way George Bush handled his job as president.

SINCE 9/11 THE FEDERAL GOVERNMENT HAS MASSIVELY REFORMED ITS HOMELAND SECURITY AND INTELLIGENCE GATHERING CAPACITIES

National Security Preparedness Group, "Tenth Anniversary Report Card: The Status of the 9/11 Commission Recommendations," Bipartisan Policy Center, September 2011.

Over the past 10 years, our government's response to the challenge of transnational terrorism has been dramatic. At the federal level, we have created major new institutions. The Department of Homeland Security itself was a massive reconfiguration of government, combining 22 agencies into a new department, with a workforce of 230,000 people and an annual budget of more than \$50 billion. In total, some 263 organizations have been established or redesigned.

The intelligence community has also adapted. In response to the recommendations of the 9/11 Commission, Congress created the Office of the Director of National Intelligence (DNI) and the National Counterterrorism Center in 2004 to advance a unified effort across the intelligence community. Four DNIs in six years have worked with the Intelligence Community (IC), sometimes with difficulty, to establish appropriate and effective roles and responsibilities. Today, key IC relationships in the new order appear to be improving and moving in a constructive direction.

At the same time, the intelligence budget has surged to more than \$80 billion – more than double what was spent in 2001. And throughout the national security community, a flexible and resilient workforce has been trained to protect the American people in a new environment. The FBI, CIA, and the broader intelligence community have implemented significant reforms, disrupting many plots and bringing to justice many terrorist operatives.

THE KILLING OF OSAMA BIN LADEN REPRESENTS A SUBSTANTIAL VICTORY FOR POST-9/11 SECURITY INITIATIVES

National Security Preparedness Group, "Tenth Anniversary Report Card: The Status of the 9/11 Commission Recommendations," Bipartisan Policy Center, September 2011.

Former CIA Director and current Secretary of Defense, Leon Panetta, declared that we are "within reach of strategically defeating al Qaeda." Only the future will tell whether that is accurate, but certainly the death of Osama bin Laden is our most significant advancement to date in our efforts to defeat al Qaeda.

The bin Laden raid resulted from years of hard work, cooperation, vigilance, and tenacity. It involved surveillance, the analysis of many bits of information, and seamless interaction between the CIA and the military. Bin Laden's capture reflected the highest level of collaboration among IC agencies and the military.

COOPERATION BETWEEN THE INTELLIGENCE COMMUNITY AND LAW ENFORCEMENT HAS IMPROVED SUBSTANTIALLY SINCE 9/11

National Security Preparedness Group, "Tenth Anniversary Report Card: The Status of the 9/11 Commission Recommendations," Bipartisan Policy Center, September 2011.

Legal, policy, and cultural barriers between agencies created serious impediments to information sharing that prevented disruption of the 9/11 attacks. Therefore, the 9/11 Commission made a number of specific recommendations to improve information sharing across our government. Information sharing within the federal government, and among federal, state, local authorities, and with allies, while not perfect, has considerably improved since 9/11.

Progress among national agencies, and between the IC and the military in the field, has been striking. The degree of interagency collaboration in Afghanistan and Iraq is unprecedented. On the domestic side, however, there has been less unity of effort and much slower progress among multiple agencies that are either new or have new counterterrorism missions.

The level of cooperation among all levels of government is higher than ever. There are now 105 Joint Terrorism Task Forces throughout the nation, and 72 Fusion Centers in which federal, state, local authorities investigate terrorism leads and share information. State and local officials have a far greater understanding not only of threats and how to respond to them, but also of their communities and those who may be at risk of radicalization.

The FBI has gone through dramatic change and continues to transform from an agency overwhelmingly focused on law enforcement to one that prioritizes preventing terrorism. This is a significant cultural change that can be furthered by placing the status of intelligence analysts on par with special agents, who have traditionally risen to management at the Bureau.

The CIA has improved its intelligence analysis and removed barriers between its analysts and operations officers. Recruiting well-placed sources, however, remains difficult and the CIA has had difficulty recruiting qualified officers with necessary language skills.

AIRLINE PASSENGER SCREENING HAS IMPROVED SUBSTANTIALLY SINCE 9/11

National Security Preparedness Group, "Tenth Anniversary Report Card: The Status of the 9/11 Commission Recommendations," Bipartisan Policy Center, September 2011.

On September 11, 2001, 19 terrorists turned airplanes into weapons. Some of those hijackers were flagged for additional screening, but the follow-up was lackluster. Others would have been flagged had better information sharing been in place. Along with information sharing improvements, the procedures for identifying airline passengers who should be prevented from boarding an airplane, or be subjected to additional screening, have been greatly enhanced.

The Transportation Security Administration (TSA) now screens the names of all airline passengers against the "no fly" and "automatic selectee" terrorist watchlists before they board an airplane. This is known as the Secure Flight program. Until last year, the airlines had the responsibility of comparing passengers against these watchlists, but that process resulted in numerous errors in missing individuals on the no fly list as well as incorrectly identifying passengers as being the particular individual on the list. It also placed sensitive information in the hands of far too many people, including officials at foreign government-owned airlines. This is an important improvement to our security.

THE EVOLUTION OF TECHNOLOGY AND THE UNIQUE POSITION OF THE UNITED STATES MAKES STREAMLINING SURVEILLANCE AN IMPORTANT OPPORTUNITY

Steven M. Bellovin [Prof. of Computer Science, Columbia University], Matthew A. Blaze [Associate Professor of Computer and Information Science at the University of Pennsylvania], Whitefield Diffie [visiting scholar at the Freeman Spogli Institute's Center for International Security and Cooperation at Stanford University], Susan Landau [Visiting Scholar in the Computer Science Department at Harvard University], Peter G. Neumann [Computer Researcher and Author], and Jennifer Rexford [Prof. of Computer Science, Princeton University], "Risking Communications Security: Potential Hazards of the Protect America Act," *University of Pennsylvania Scholarly Commons*, (January 2008).

Much of the motivation for changes to FISA arises from the geography of the world's communications infrastructure combined with recent changes to telecommunications technology. The US is a major hub in our communication-centered world, giving the National Security Agency (NSA), which is the US signals intelligence agency, significant opportunities for access to transit traffic.

There are numerous reasons for US centrality in the world's communications systems. One is cost: the US is the world's leading economy, and fiber optic cables—how modern wired communications travel—have been built installed between the US and overseas. With their economies of scale, these cables enable US providers to underbid regional carriers—for example, much of South America transits its traffic through Miami. Another reason is politics, which can lead to strange communication paths. For many years, communications could not travel directly between Taiwan and the People's Republic of China: calls traveled by way of Sacramento via AT&T lines. A third reason is the Internet. Many servers that are the very reason for communication—for example, Yahoo Mail, Hotmail, and Gmail—are in the US (although this is an ever decreasing percentage of the world's mail servers, especially as China comes online).

At the time that FISA was written, communications satellites (radio) had revolutionized international communications. In subsequent decades, there was a major shift to fiber optic cables with a decreasing percentage of intercontinental communications traveling by radio. Thus the exemption allowing warrantless radio interception became increasingly less applicable. In recent years, the NSA has pressed to have the exemption updated. While many in the field agree that there is plausibly a problem resulting from the introduction of fiber optic cables, the Protect America Act went considerably further.

SIGNALS INTELLIGENCE IS DIVIDED INTO A SEVEN STEP PROCESS

Steven M. Bellovin [Prof. of Computer Science, Columbia University], Matthew A. Blaze [Associate Professor of Computer and Information Science at the University of Pennsylvania], Whitefield Diffie [visiting scholar at the Freeman Spogli Institute's Center for International Security and Cooperation at Stanford University], Susan Landau [Visiting Scholar in the Computer Science Department at Harvard University], Peter G. Neumann [Computer Researcher and Author], and Jennifer Rexford [Prof. of Computer Science, Princeton University], "Risking Communications Security: Potential Hazards of the Protect America Act," *University of Pennsylvania Scholarly Commons*, (January 2008).

Signals intelligence is organized into a seven-step process: access, collection, processing, exploitation, analysis (intelligence analysis), reporting, and dissemination. The first three are of particular concern. Access is what happens at a radio, a fiber splitter, a tap on a wire, or a tap in a telephone switch. Collection is the process of recording signals for consideration. Recorded signals can be kept briefly or for very long periods.

Processing is shorthand for selecting the information you want (and filtering out what you don't). As in any learning process, if you can find information at all, you often have too much of it and must extract what interests you from what doesn't. This is where the choice of architecture is significant, both in terms of minimizing data collection and in determining how the combination of data sources is used. We return to this point later.

NEGATIVE EVIDENCE

NATIONAL SECURITY DOES NOT JUSTIFY SACRIFICING FUNDAMENTAL CONSTITUTIONAL VALUES

United States v. Robel, 389 US 258 - Supreme Court 1967

The Government seeks to defend the statute on the ground that it was passed pursuant to Congress' war power. The Government argues that this Court has given broad deference to the exercise of that constitutional power by the national legislature. That argument finds support in a number of decisions of this Court.[8] However, the phrase "war power" cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. 264*264 "[E]ven the war power does not remove constitutional limitations safeguarding essential liberties." Home Bldg. & Loan Assn. v. Blaisdell, 290 U. S. 398, 426 (1934). More specifically in this case, the Government asserts that § 5 (a) (1) (D) is an expression "of the growing concern shown by the executive and legislative branches of government over the risks of internal subversion in plants on which the national defense depend[s]."[9] Yet, this concept of "national defense" cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term "national defense" is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile.

LITTLE IS KNOWN ABOUT NSA WARRANTLESS WIRETAPPING OTHER THAN THAT IT MONITORS INTERNATIONAL COMMUNICATIONS BETWEEN U.S. CITIZENS AND SUSPECTED TERRORISTS

Fletcher N. Baldwin, Jr. [Prof. of Law, Levin College of Law] and Robert B. Shaw [Research Fellow, Levin College of Law] , "Down to the Wire: Assessing the Constitutionality of the National Security Agency's Warrantless Wiretapping Program: Exit the Rule of Law," 17 University of Florida Journal of Law & Public Policy 429 (2006).

The controversy has yet to be resolved. Defendants and critics have assembled along political fault lines and are prepared to do battle over the program's constitutionality. Yet, for all the partisan posturing, little about the program is actually known by the public. The Administration's own statements establish that: (1) the NSA program monitors only international communications between the United States and a foreign country; 27 (2) the program is triggered when a non-judicial "career professional" at the NSA has reasonable grounds to believe that one of the parties to a communication is a member of a foreign terrorist organization; 28 (3) the program targets U.S. citizens living within the United States; 29 and (4) the program does not require a warrant, before beginning surveillance. 30

THE FOURTH AMENDMENT RIGHT TO PRIVACY IS FUNDAMENTAL AND IS CLEARLY VIOLATED BY WARRANTLESS WIRETAPPING

Fletcher N. Baldwin, Jr. [Prof. of Law, Levin College of Law] and Robert B. Shaw [Research Fellow, Levin College of Law] , “Down to the Wire: Assessing the Constitutionality of the National Security Agency’s Warrantless Wiretapping Program: Exit the Rule of Law,” 17 University of Florida Journal of Law & Public Policy 429 (2006).

The right to privacy is a traditional American expectation. At present, there is an exceptional tension between non-transparent National Security policies and expectations individuals have regarding civil liberties. Without judicial oversight, such weapons give free reign to one branch of government, the executive. As Justice Scalia suggested in *Kyllo v. United States* 10 “the sanctity of the home deserves the highest protections of the Constitution.” 11 Within the sanctity of the home resides an expectation of privacy of the heart, soul and mind. Such expectations run contrary to unsupervised total physical surveillance. Thus, to invade that expectation, government agents must in some manner work within the Fourth Amendment and employ a certain level of judicial scrutiny. Governmental privacy invasions have occurred in the past, but none appear as egregious as those reported in the *New York Times* and known as the National Security Agency (NSA) Warrantless Wiretapping Program. 12

THE SUPREME COURT HAS HELD THAT WIRETAPPING TO COMBAT DOMESTIC CRIMINAL ORGANIZATIONS MAY ONLY BE DONE UNDER THE AUTHORITY OF A WARRANT

Fletcher N. Baldwin, Jr. [Prof. of Law, Levin College of Law] and Robert B. Shaw [Research Fellow, Levin College of Law] , "Down to the Wire: Assessing the Constitutionality of the National Security Agency's Warrantless Wiretapping Program: Exit the Rule of Law," 17 University of Florida Journal of Law & Public Policy 429 (2006).

In an effort to clarify the legality of Warrantless surveillance, the U.S. Supreme Court considered whether the Fourth Amendment contained a national security exception. 86 In *United States v. U.S. District Court for the Eastern District of Michigan (Keith)*, the government, without prior judicial review, intercepted communications of an individual who conspired to bomb a federal building. 87 The government argued that Warrantless surveillance was necessary to protect the country from "attempts of *domestic organizations* to attack and subvert the existing [government] structure" 88 In addition, the government urged that (1) the judicial branch did not have the practical knowledge to determine whether probable cause existed to believe that surveillance was necessary to protect national security and (2) that the inclusion of the judicial branch would result in leaks of sensitive information to the public. 89 The *Keith* Court agreed that the "covertness and complexity" 90 of political subversives and their "dependency ... upon the telephone" 91 makes wiretapping an effective weapon. 92 However, the *Keith* court was profoundly apprehensive of the invasive nature of electronic surveillance. 93 Recognizing that the "broader spirit" of the Fourth Amendment was to shield private communications from unreasonable surveillance, 94 the *Keith* Court analyzed two central inquiries relating to domestic national security: (1) "whether the needs of citizens for privacy and free expression may not be better protected by requiring a warrant" 95 and (2) "whether a warrant requirement would unduly frustrate the efforts of the government to protect itself." 96

In response to the first *Keith* inquiry, the Court held that basic constitutional freedoms are best served through the distinct function of the different branches of government. 97 According to the Court, judicial review of executive action by a neutral and detached magistrate is the touchstone of preserving privacy and free expression. 98 As such, the proper function of the branches is for the executive branch to seek a warrant and for the judicial branch to approve a warrant prior to the search. 99 Specifically citing Justice Douglas's concurrence in *Katz*, the Court explained that the Fourth Amendment did not contemplate the government a a neutral and detached magistrate because of the government's responsibility to prosecute and investigate criminal behavior. 100 Thus, the Court held that citizens'; needs for privacy and free expression would be best served by securing a warrant through the judicial branch. 101

In response to the second *Keith* question, the Court recognized the validity of the government's argument that warrantless surveillance was an extremely efficient method of investigation. 102 However, the Court was not convinced that the judicial branch was inept to analyze domestic national security threats. 103 Rather, the Court responded that the judicial branch was perfectly competent to evaluate whether a warrant was needed because the court regularly dealt with sensitive and complex issues central to domestic national security. Furthermore, the Court found that the involvement of the judicial branch did not create domestic national security vulnerabilities. 104

FISA PROVIDES A JUDICIAL DETERMINATION OF PROBABLE CAUSE TO AUTHORIZE SURVEILLANCE OF FOREIGN THREATS IN AN EXPEDITIOUS WAY

Fletcher N. Baldwin, Jr. [Prof. of Law, Levin College of Law] and Robert B. Shaw [Research Fellow, Levin College of Law] , “Down to the Wire: Assessing the Constitutionality of the National Security Agency’s Warrantless Wiretapping Program: Exit the Rule of Law,” 17 University of Florida Journal of Law & Public Policy 429 (2006).

With the public incensed by the Church Committee Reports and the judiciary eager to abridge executive surveillance power, Congress set out to regulate the executive use of warrantless surveillance. 131 Congress’s efforts culminated in the passage of FISA, which authorized the executive branch, after securing a warrant, to conduct electronic surveillance of “foreign powers” and “agents of foreign powers” for “foreign intelligence information.” 132

FISA created a specialized court system to grant authorization to conduct electronic surveillance of foreign powers and their agents for foreign intelligence gathering purposes. 133 FISA authorizes the Chief Justice of the U.S. Supreme Court to designate seven U.S. district court judges to constitute a lower court (FISA Court), and to designate three judges from U.S. district courts or U.S. courts of appeal to constitute a court of review (FISA Court of Review). 134 The FISA Court of Review has jurisdiction to review a FISA Court denial of an application submitted under the act. 135 If the FISA Court of Review determines that the denial was proper, the U.S. Supreme Court then has jurisdiction to review the decision. 136

To obtain a warrant under FISA, the executive branch must appeal to Foreign Intelligence Surveillance Court (FISC), a specially created court of review consisting of federal district court judges. 137 Under FISA, the FISC will allow surveillance if there is probable cause to believe that the “purpose of the surveillance is to obtain foreign intelligence information.” 138 In the event of a national emergency, 139 the President may authorize immediate warrantless surveillance provided that the executive obtains a warrant within seventy-two hours. 140

THE PATRIOT ACT LOWERED THE THRESHOLD FOR PROBABLE CAUSE PREVIOUSLY APPLIED UNDER FISA

Fletcher N. Baldwin, Jr. [Prof. of Law, Levin College of Law] and Robert B. Shaw [Research Fellow, Levin College of Law] , “Down to the Wire: Assessing the Constitutionality of the National Security Agency’s Warrantless Wiretapping Program: Exit the Rule of Law,” 17 University of Florida Journal of Law & Public Policy 429 (2006).

But the global war against terrorism required action in the homeland as well. In an effort to rectify legislative deficiencies in law enforcement and intelligence collection, U.S. lawmakers passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (Patriot Act). 170 The Patriot Act lowered the standard of probable cause under FISA so that a law enforcement official could obtain a warrant upon a showing of probable cause that “a significant purpose of the investigation” was for foreign surveillance purposes. 171 This lower standard effectively removed the barrier that previously separated criminal investigations from foreign intelligence surveillance under FISA. 172

EVEN IF THE PRESIDENT HAS THE INHERENT AUTHORITY TO GATHER INTELLIGENCE, THAT AUTHORITY MUST NONETHELESS BE EXERCISED WITHIN THE BOUNDS OF THE FOURTH AMENDMENT

Fletcher N. Baldwin, Jr. [Prof. of Law, Levin College of Law] and Robert B. Shaw [Research Fellow, Levin College of Law] , "Down to the Wire: Assessing the Constitutionality of the National Security Agency's Warrantless Wiretapping Program: Exit the Rule of Law," 17 University of Florida Journal of Law & Public Policy 429 (2006).

Relying on his role as Commander-in-Chiefs and his authority as the final arbiter of international relations, the President asserts that the Constitution compels him to "protect the Nation from foreign attack." 231 The President argues that he must have the "authority to gather information necessary for the executive of his office." 232 Additionally, the President insists that he enjoys a heightened level of authority because he is presently acting as the Commander-in-Chief during wartime. 233

While the president is correct that he enjoys substantial authority in international relations 234 and in his capacity as Commander-in-Chief, 235 the President's actions must still comport to the rest of the Constitution. 236 As a separate consideration in *Hamdi*, the Supreme Court held that a President, even while acting in the course of his capacity of Commander-in-Chief, must do so under the precepts of the Constitution. 237 To that end, even if the President has the inherent authority to conduct warrantless surveillance of some sort, his activities must comport to Fourth Amendment standards. 238

NSA WARRANTLESS WIRETAPPING IS UNCONSTITUTIONAL. THE FOURTH AMENDMENT CANNOT BE SWEEPED ASIDE FOR THE SAKE OF ADMINISTRATIVE EFFICIENCY

Fletcher N. Baldwin, Jr. [Prof. of Law, Levin College of Law] and Robert B. Shaw [Research Fellow, Levin College of Law] , "Down to the Wire: Assessing the Constitutionality of the National Security Agency's Warrantless Wiretapping Program: Exit the Rule of Law," 17 University of Florida Journal of Law & Public Policy 429 (2006).

Examining the NSA program under the first tier of the *Keith* analysis, the citizens' needs for privacy and free expression would unquestionably be best protected by requiring a warrant. The *Keith* court recognized that the commands of the Fourth Amendment cannot be swept aside for the sake of administrative efficiency. 245 On behalf of the *Keith* majority, Justice Powell wrote:

The warrant clause of the Fourth Amendment ... has been a "values part of our constitutional law for decades, and it has determined the result in scores and scores of cases In courts all over this country. It is not an inconvenience to be somehow weighed against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the well-intentioned but mistakenly over-zealous executive officers' who are a party of any system of law enforcement." 246

There is no substitute for a warrant based on probable cause to protect the rights of citizens. The warrant requirement ensures that the public will be free from undue and burdensome governmental intrusion. Yet in contravention of this essential constitutional command, the NSA program does not require a warrant. 247 The absence of this crucial constitutional protection undermines the legality of the program.

THE NSA STANDARD FOR PROBABLE CAUSE IN RELATION TO ITS WARRANTLESS WIRETAPPING PROGRAM IS IMPOSSIBLY BROAD AND THUS FUNCTIONALLY LEAVES LAW ENFORCEMENT UNCHECKED

Fletcher N. Baldwin, Jr. [Prof. of Law, Levin College of Law] and Robert B. Shaw [Research Fellow, Levin College of Law] , "Down to the Wire: Assessing the Constitutionality of the National Security Agency's Warrantless Wiretapping Program: Exit the Rule of Law," 17 University of Florida Journal of Law & Public Policy 429 (2006).

Instead of a warrant, the NSA program operates on a standard of suspicion that has never been recognized by the U.S. Supreme Court, or any other court. The NSA program is triggered when the Administration has a "reasonable basis to conclude that one party to the communication is a member of al-Qaeda, affiliated with al-Qaeda, or a member of an organization affiliated with al-Qaeda, or working in support of al-Qaeda." 249 The NSA program's impossibly broad standard is nearly infinite in application. 250 As suggested by Professor Laurence Tribe, 251, "a United States citizen living here who received a phone call from another United States citizen who attends a mosque that the administration believes is 'supportive' of al-Qaeda could be wiretapped without a warrant." 252 The lack of a workable standard of probable cause forces the conclusion that the privacy rights of citizens would best be protected by requiring a warrant.

NSA WARRANTLESS WIRETAPPING IS FUNDAMENTALLY INCONSISTENT WITH THE CHECKS AND BALANCES ASSURED BY A SEPARATION OF POWERS

Fletcher N. Baldwin, Jr. [Prof. of Law, Levin College of Law] and Robert B. Shaw [Research Fellow, Levin College of Law] , "Down to the Wire: Assessing the Constitutionality of the National Security Agency's Warrantless Wiretapping Program: Exit the Rule of Law," 17 University of Florida Journal of Law & Public Policy 429 (2006).

Worst of all, the NSA program is an unchecked exercise of executive power. In the NSA program, only the executive branch concludes whether an individual is affiliated with al-Qaeda. 253 In *Keith*, Justice Powell recognized the inherent danger of that situation:

Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch. The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate and to prosecute. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and speech. 254

The NSA program is plagued with a conflict of interest. It is devoid of judicial intervention. Without the cooperation of the judiciary, there is no check on law enforcement officials who are quick to ignore potential errors in judgment when the prosecution of a suspected terrorist is in sight. It is irrelevant that the Administration has the best intentions of ending global terrorism; the NSA program is simply too susceptible to abuse. The failure of the Administration to integrate the judicial branch undermines the indispensable system of checks and balances on which this government is based. As such, the program raises significant concerns under the Fourth Amendment.

**A WARRANT REQUIREMENT IS NOT UNDULY BURDENSOME ON THE PRESIDENT'S
ABILITY TO CONDUCT FOREIGN AFFAIRS**

Fletcher N. Baldwin, Jr. [Prof. of Law, Levin College of Law] and Robert B. Shaw [Research Fellow, Levin College of Law] , "Down to the Wire: Assessing the Constitutionality of the National Security Agency's Warrantless Wiretapping Program: Exit the Rule of Law," 17 University of Florida Journal of Law & Public Policy 429 (2006).

The President's arguments are not unique. The cited reasons for excusal from the warrant requirement were considered and rejected by the *Zweibon* court. 261 While still mindful of the President's substantial grant of power in the realm of foreign affairs, the *Zweibon* court – over thirty years ago – confronted the arguments that the President advances today. 262 The *Zweibon* court found that the warrant requirement was not an inefficient procedural hurdle because judges are not "insensitive or uncomprehending of the issues involved in foreign security," 263 and therefore the judges "will not deny any legitimate requests for a warrant." 264 The *Zweibon* court recognized that the executive branch was the expert on foreign affairs. 265 However, the Court noted that the judicial branch was perfectly capable of understanding the complexities and dimensions of the international arena. 266 As stated in *Zweibon*, "If the threat is too subtle or complex for our senior law enforcement officers to convey its significance to a court, one may question whether there is probable cause for surveillance." 267 Finally, while the Constitution does designate the President as the authority in international affairs, the *Zweibon* court reasoned that the President's authority must be tempered with careful judicial scrutiny. 268 In short, a warrant requirement does not pose an undue burden on the executive branch.

**TO FIGHT THE WAR ON TERROR WE DO NOT NEED A NEW PARADIGM WHICH
ESCHEWS THE RULE OF LAW IN THE NAME OF EXIGENCY**

Fletcher N. Baldwin, Jr. [Prof. of Law, Levin College of Law] and Robert B. Shaw [Research Fellow, Levin College of Law] , "Down to the Wire: Assessing the Constitutionality of the National Security Agency's Warrantless Wiretapping Program: Exit the Rule of Law," 17 University of Florida Journal of Law & Public Policy 429 (2006).

The war on terror is summarily and singularly about overwhelming, supreme emergencies where there is no time for debate, deliberation, or choice. The "war" necessitates unprecedented governmental opaqueness, secrecy, intrusion, and renders "quaint" 277 the traditional rules of war and democratic values of due process, equal protection, privacy, and human dignity enshrined within the U.S. Constitution and international agreements. 278 Reducing the war on terror to exigent circumstances is sheer fantasy – constituent consumption, intended to be consumed without pause of thought. Attempts at limiting the entire debate on how best to combat global terrorism to a false premise based upon ticking time bombs and imminent attacks from terrorist and rogue states is a political ploy that has little to do with reality in most cases. Will the result of such interference be civil war?

In reality, the lion's share of combating global terrorism comprises a web of complexities. Its components include methodically and painstakingly acquiring bits of intelligence and piecing them together into a larger mosaic. By seizing and freezing assets of terrorists and terrorist organizations, implementing foreign policies and employing diplomatic pressure on states susceptible to terrorist activities, a responsible war on global terrorism can be waged. Many terrorist plots, including the 9/11 attacks on the United States, are not planned or carried out in minutes, hours, or even days. They appear to be a product of patient and methodical planning by terrorists over the course of years and span several continents. 279

THE WAR ON TERROR MUST BE CONDUCTED WITHIN THE BOUNDS OF THE RULE OF LAW. THE PRESIDENT DOES NOT HAVE UNLIMITED AUTHORITY

Fletcher N. Baldwin, Jr. [Prof. of Law, Levin College of Law] and Robert B. Shaw [Research Fellow, Levin College of Law] , "Down to the Wire: Assessing the Constitutionality of the National Security Agency's Warrantless Wiretapping Program: Exit the Rule of Law," 17 University of Florida Journal of Law & Public Policy 429 (2006).

In all but the most extreme circumstances, combating global terrorism should be a deliberate, debatable, multilateral undertaking; the combat efforts should always operate within the parameters of the rule of law. The Framers of the U.S. Constitution appeared to concede that the office of the chief executive needed to exercise a limited amount of secrecy, 280 speed, and dispatch to protect the national security of the United States. 281 The Framers, having an aversion to unaccountable standing armies, also agreed that significant war powers would be vested in Article I, the legislative branch, as a means of establishing a check on the executive's powers as Commander-in-Chief. 282 The Frame's fear of limitless power of the executive *vis-à-vis* as Commander-in-Chief of the armed forces is evidenced in the Declaration of Independence and in the Bill of Rights – the latter serving as a further check on executive power. Thus, while it is fairly clear that the President has some powers under Article II to preserve, protect, and defend the nation as Commander-in-Chief, it is also equally clear that those powers were never intended to be plenary. 283 If this were so, then we would have no need for little inconveniences such as having Congress battle over whether or not certain provisions of the Patriot Act should be extended, made permanent, or scrapped entirely. President Bush, acting under Article II, could simply authorize the Patriot Act's mandates without congressional or judicial participation, and a police state would be created. Thus, we would have the President functioning under the rule of law and no longer under the constitutional rule of law. 284

INDEFINITE DETENTION CONSTRUCTS DETAINEES AS LESS THAN HUMAN

Judith Butler [Prof. of Rhetoric and Comparative Literature, University of California at Berkeley], Precarious Life: The Powers of Mourning and Violence. New York: Verso (2006; First Published 2004), pp. xv-xvi

These prisoners are not considered "prisoners" and receive no protection from international law. Although the US claims that its imprisonment methods are consistent with the Geneva Convention, it does not consider itself bound to those accords, and offers none of the legal rights stipulated by that accord. AS a result, the humans who are imprisoned in Guantanamo do not count as human; they are not subjects protected by international law. They are not subjects in any legal or normative sense. The dehumanization effected by "indefinite detention" makes use of an ethnic frame for conceiving who will be human, and who will not. Moreover, the policy of "indefinite detention" produces a sphere of imprisonment and punishment unfettered by any laws except those fabricated by the Department of State. The state itself thus attains a certain "indefinite" power to suspend the law and to fabricate the law, at which point the separation of powers is indefinitely set aside. The Patriot Act constitutes another effort to suspend civil liberties in the name of security, one that I do not consider in these pages, but hope to in a future article. In versions 1 and 2 of the Patriot Act, it is the public intellectual culture that is targeted for control and regulation, overriding longstanding claims to intellectual freedom and freedom of association that have been central to conceptions of democratic political life.

THE INDEFINITE NATURE OF STATE EMERGENCY JUSTIFIES THE SUSPENSION OF RIGHTS AND THE TYRANNY OF PETTY SOVEREIGNS FOR THE FORESEEABLE FUTURE

Judith Butler [Prof. of Rhetoric and Comparative Literature, University of California at Berkeley], Precarious Life: The Powers of Mourning and Violence. New York: Verso (2006; First Published 2004), pp. 64-65

These prisoners at Camp Delta (and formerly known as Camp X-Ray), detained indefinitely, are not even called “prisoners” by the Department of Defense or by representatives of the current US administration. To call them by that name would suggest that internationally recognized rights pertaining to the treatment of prisoners of war ought to come into play. They are, rather, “detainees,” those who are held in waiting, those for whom waiting may well be without end. To the extent that the state arranges for this pre-legal state as an “indefinite” one, it maintains that there will be those held by the government for whom the law does not apply, not only in the present, but for the indefinite future. In other words, there will be those for whom the protection of law is indefinitely postponed. The state, in the name of its right to protect itself and, hence, and through the rhetoric of sovereignty, extends its power in excess of the law and defies international accords; for if the detention is indefinite, then the lawless exercise of state sovereignty becomes indefinite as well. In this sense, indefinite detention provides the condition for the indefinite exercise of extra-legal state power. Although the justification for not providing trials – and the attendant rights of due process, legal counsel, rights of appeal – is that we are in a state of national emergency, a state understood as out of the ordinary, it seems to follow that the state of emergency is not limited in time and space, that it, too, enters onto an indefinite future. Indeed, state power restructures temporality itself, since the problem of terrorism is no longer a historically or geographically limited problem: it is limitless and without end, and this means that the state of emergency is potentially limitless and without end, and that the prospect of an exercise of state power in its lawlessness structures the future indefinitely. The future becomes a lawless future, not anarchical, but given over to the discretionary decisions of a set of designated sovereigns – a perfect paradox that shows how sovereigns emerge within governmentality – who are beholden to nothing and to no one except the performative power of their own decisions. They are instrumentalized, deployed by tactics of power they do not control, but this does not stop them from using power, and using it to reanimate a sovereignty that the governmentalized constellation of power appeared to have foreclosed. These are petty sovereigns, unknowing, to a degree, about what work they do, but performing their acts unilaterally and with enormous consequence. Their acts are clearly *conditioned*, but their acts are judgments that are nevertheless *unconditional* in the sense that they are final, not subject to review, and not subject to appeal.

NEW REGULATIONS NOW ESCHEW HUMAN RIGHTS TO ALLOW INDEFINITE DETENTION AND QUESTIONABLE DETERMINATIONS OF DANGEROUSNESS

Judith Butler [Prof. of Rhetoric and Comparative Literature, University of California at Berkeley], Precarious Life: The Powers of Mourning and Violence. New York: Verso (2006; First Published 2004), pp. 56-57

With the publication of the new regulations, the US government holds that a number of detainees at Guantanamo will not be given trials at all, but will rather be detained indefinitely. It is crucial to ask under what conditions some human lives cease to become eligible for basic, if not universal, human rights. How does the US government construe these conditions? And to what extent is there a racial and ethnic frame through which these imprisoned lives are viewed and judged such that they are deemed less than human, or as having departed from the recognizable human community? Moreover, in maintaining that some prisoners will be detained indefinitely, the state allocates to itself a power, an indefinitely prolonged power, to exercise judgments regarding who is dangerous and, therefore, without entitlement to basic legal rights. In detaining some prisoners indefinitely, the state appropriates for itself a sovereign power that is defined over and against existing legal frameworks, civil, military, and international. The military tribunals may well acquit someone of a crime, but not only is that acquittal subject to mandatory executive review, but the Department of Defense has also made clear that acquittal will not necessarily end detention. Moreover, according to the new tribunal regulations, those tried in such a venue will have no right to appeal to US civil courts (and US courts, responding to appeals, have so far maintained that they have no jurisdiction over Guantanamo, which falls outside US territory). Here we can see that the law itself is either suspended or regarded as an instrument that the state may use in the service of constraining and monitoring a given population. Under this mantle of sovereignty, the state proceeds to extend its own power to imprison indefinitely a group of people without trial. In the very act by which state sovereignty suspends law, or contorts law to its own uses, it extends its own domain, its own necessity, and develops the means by which the justification of its own power takes place. Of course, this is not the "state" in toto, but an executive branch working in tandem with an enhanced administrative wing of the military.

ENEMY COMBATANTS ARE DETAINED WITH UNPERSUASIVE OR NONEXISTENT EVIDENCE OF WRONGDOING

Judith Butler [Prof. of Rhetoric and Comparative Literature, University of California at Berkeley], Precarious Life: The Powers of Mourning and Violence. New York: Verso (2006; First Published 2004), pp. xv-xvi

The military tribunals were originally understood to apply not only to those arrested within the US, but to "high-ranking" officials within the Taliban or al-Qaeda military networks currently detained in Guantanamo Bay. The *Washington Post* reported that

there may be little use for the tribunals because the great majority of the 300 prisoners [in March of 2002] being held at the US naval base at Guantanamo Bay, Cuba, are low-ranking foot soldiers. Administration officials have other plans for many of the relatively junior captives now at Guantanamo Bay: indefinite detention without trial. US officials would take this action with prisoners they fear could pose a danger of terrorism even if they have little evidence of past crimes.

"Could pose a danger of terrorism": this means that conjecture is the basis of detention, but also that conjecture is the basis of an indefinite detention without trial. One could simply respond to these events by saying that everyone detained deserves a trial, and I do believe that is the right thing to say, and I am saying that. But saying that would not be enough, since we have to look at what constitutes a trial in these new military tribunals. What kind of trial does everyone deserve? In these new tribunals, evidentiary standards are very lax. For instance, hearsay and second-hand reports will constitute relevant evidence, whereas in regular trials, either in the civil court system or the established military court system, they are dismissed out of hand. Whereas some international human rights courts do permit hearsay, they do so under conditions in which *non-refoulement* is honored, that is, rules under which prisoners may not be exported to countries where confessions can be extracted through torture. Indeed, if one understands that trials are usually the place where we can test whether hearsay is true or not, where second-hand reports have to be documented by persuasive evidence or dismissed, then the very meaning of the trial has been transformed by the notion of a procedure that explicitly admits unsubstantiated claims, and where the fairness and non-coercive character of the interrogatory means used to garner that information has no bearing on the admissibility of the information into trial.

POST-9/11 RESTRICTIONS ON THE FREEDOM OF INFORMATION ACT REDUCE THE AMOUNT OF INFORMATION AVAILABLE TO THE PUBLIC

Kristen Elizabeth Uhl [Managing Editor, American University Law Review, Volume 53; J.D. Candidate, May 2004, American University, Washington College of Law], "Comment: THE FREEDOM OF INFORMATION ACT POST-9/11: BALANCING THE PUBLIC'S RIGHT TO KNOW, CRITICAL INFRASTRUCTURE PROTECTION, AND HOMELAND SECURITY," 53 Am. U. L. Rev. 261 2003-2004.

As described above, the Ashcroft Memorandum effectively requires the public to have a "need to know" the information it requests,¹³⁵ the same legal standard that existed prior to the enactment of FOIA in 1966.¹³⁶ Such a high standard of proof on the part of the requesters could give agencies a green light to restrict access to government information—a result that could ultimately diminish the American public's legal right of free and open access to government information. ¹³⁷

WEAKENING FOIA UNDERMINES GOVERNMENT ACCOUNTABILITY

Kristen Elizabeth Uhl [Managing Editor, American University Law Review, Volume 53; J.D. Candidate, May 2004, American University, Washington College of Law], "Comment: THE FREEDOM OF INFORMATION ACT POST-9/11: BALANCING THE PUBLIC'S RIGHT TO KNOW, CRITICAL INFRASTRUCTURE PROTECTION, AND HOMELAND SECURITY," 53 Am. U. L. Rev. 261 2003-2004.

Following the terrorist attacks on September 11, 2001, the public entrusted the government to protect national security and might be reluctant to question, or may not even be aware of, the attendant reduction of civil liberties.²⁴⁸ The ramifications of the Bush Administration's FOIA guidance, geared toward agencies, were not widely reported in the mainstream news media.²⁴⁰ Similarly, the controversy surrounding DHS labor rules often eclipsed the CIA 250 FOIA debate on Capitol Hill.

The Bush Administration must not mistake the American public's apparent complacency on this matter as tacit approval of expansion of governmental secrecy. With DHS now serving as the figurehead for the nation's counter-terrorism efforts, expectations of enhanced national security fall squarely upon its shoulders. The public is ²⁵¹ already skeptical about DHS's ability to safeguard our nation. One terrorist attack would intensify public scrutiny and raise questions as to why DHS's mission failed.²⁵² Chances are DHS will somehow fail, because there is no other agency that faces a more difficult task involving such high risks. ⁵³ The public could be outraged to discover that one practical ramification of CIA FOIA exemption is that the public cannot directly hold DHS-its own government-accountable ²⁵⁴ for its operations.

THE PUBLIC'S RIGHT TO KNOW IS IMPORTANT DURING A TIME OF WAR, AND SO FOIA MUST BE RESPECTED

Kristen Elizabeth Uhl [Managing Editor, American University Law Review, Volume 53; J.D. Candidate, May 2004, American University, Washington College of Law], "Comment: THE FREEDOM OF INFORMATION ACT POST-9/11: BALANCING THE PUBLIC'S RIGHT TO KNOW, CRITICAL INFRASTRUCTURE PROTECTION, AND HOMELAND SECURITY," 53 Am. U. L. Rev. 261 2003-2004.

Those who believe that the overly broad cession of the public's right to know is necessary in this "war against terrorism should recall the remarks of a certain Republican congressman from Illinois:

[D]isclosure of government information is particularly important today because government is becoming involved in more and more aspects of every citizen's personal and business life, and so access to information about how government is exercising its trust becomes increasingly important.^{3 1}

Donald Rumsfeld made this statement in support of FOIA in turbulent 1966. Now the Bush Administration's Secretary of Defense, Secretary Rumsfeld's words ring true in this era of increased government secrecy, when governmental transparency appears to have become a casualty of war. ² Only time will reveal the effects of these new restrictions on the public's right to government information. As long as the Bush Administration and Congress refuse to work within the adequate preexisting FOIA framework to address national security concerns, the prospects for governmental transparency in this new era appear grim.

NEW RULES FOR FOREIGN INTELLIGENCE WIRETAPPING THREATEN AMERICAN PRIVACY AND SECURITY

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In August 2007, United States' wiretapping law changed: the new Protect America Act permits warrantless foreign-intelligence wiretapping from within the US of any communications believed to include a party located outside it. US systems for foreign intelligence surveillance located outside the United States minimize access to the traffic of US persons by virtue of their location. The new act could lead to surveillance on an unprecedented scale that will unavoidably intercept some purely domestic communications. A civil liberties concern is whether the act puts Americans at risk of spurious—and invasive—surveillance by their own government, whereas the security concern is whether the new law puts Americans at risk of illegitimate surveillance by others.

BUILDING SURVEILLANCE TECHNOLOGIES INTO COMMUNICATIONS NETWORKS IS A RISKY PROPOSITION

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Building surveillance technologies into communication networks is risky. The Greeks learned this lesson the hard way; two years ago, they discovered that legally installed wiretapping software in a cellphone network had been surreptitiously enabled by parties unknown, resulting in the wiretapping of more than 100 senior members of the government for almost a year.¹ Things are not much better in Italy, where a number of Telecom Italia employees have been arrested for illegal wiretapping (with attempts at blackmail).²

THE PROTECT AMERICA FIRST ACT DOES AWAY WITH THE WARRANT REQUIREMENT FOR CERTAIN TYPES OF SURVEILLANCE, ALTHOUGH SURVEILLANCE TECHNOLOGY IS OFTEN INADEQUATE

Steven M. Bellovin [Prof. of Computer Science, Columbia University], Matthew A. Blaze [Associate Professor of Computer and Information Science at the University of Pennsylvania], Whitefield Diffie [visiting scholar at the Freeman Spogli Institute's Center for International Security and Cooperation at Stanford University], Susan Landau [Visiting Scholar in the Computer Science Department at Harvard University], Peter G. Neumann [Computer Researcher and Author], and Jennifer Rexford [Prof. of Computer Science, Princeton University], "Risking Communications Security: Potential Hazards of the Protect America Act," *University of Pennsylvania Scholarly Commons*, (January 2008).

The Protect America Act (Public Law No. 110-55) dropped the warrant requirement for communications (over any medium) of US persons located in the United States with persons "reasonably believed to be located outside the United States."⁶ Modern communications technology—mobile phones, WiFi, and the Internet—often make it difficult to discern whether communication is from a location inside or outside the US, so the question is on what basis communications will be collected. In other words, there is an important distinction between the requirements of the law and what can be done with available technology.

LOOSENING RESTRICTIONS ON ACCESS TO CALL DETAIL RECORDS PRESENTS A SUBSTANTIAL RISK TO PRIVACY

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Modern telecommunications allow the construction of smooth-running organizations that span the globe; telecommunications are the nervous systems of these organizations. The "reasonably believed to be located outside the United States" aspect of the Protect America Act arguably changes the rules on the government's use of call detail records (CDRs), which can be surprisingly revelatory of relationships and organizational structure (although this data does not always reveal where communicating parties are physically located). It appears that the US government has real-time access to CDRs without need for a court order.

CDRs are essentially the raw data for traditional phone bills. Phone companies build and maintain comprehensive databases of such information, which contain complete call traffic data: records of such transactional information as calling and called numbers for phone calls, IP addresses and user URIs in the case of voice-over IP (VoIP); SMTP headers for emails; location, time, and date of communications; call duration; and related information. To listen to an organization's communications is to read its mind, and following just the pattern of its communications is a large step in this direction. CDRs provide a window into the past. Phone companies use such data for billing, engineering, marketing, and fraud detection. Unlike a wiretap or pen register, which provide, respectively, real-time access only to the content or number currently being dialed, a CDR database contains a wealth of data on previous communications. Thus, an interested government agency doesn't need to have the proper legal authorization or technology in place before a call is made but may search the call detail database during the communication to determine a "community of interest"—the network of people with whom the suspect is in contact—as well as later, once a new target has been identified. For international and some purely domestic calls, two CDRs exist for each communication, one from the origination point—which could be an interface to another company—and one from the termination.

Although transactional information has historically been viewed as much less deserving of privacy protection than call content, in fact, access to CDRs can be a major privacy risk. Corinna Cortes and her colleagues at AT&T Shannon Labs showed, for example, that, even though the calling number had changed, it was possible to identify an individual caller from a 300-Tbyte CDR database by simply looking at patterns of called numbers.¹⁶ While at Katholieke Universiteit Leuven, George Danezis related a story in which Intel researchers studying ambient Bluetooth activity to improve ad-hoc routing protocols issued staff members Bluetooth devices. One of the discoveries was that a pair of researchers were meeting nightly, a relationship that had not been previously known to the other lab members.¹⁷

CDRs can be used for targeting more detailed surveillance, such as wiretapping. The more tightly coupled CDR and content collection are, the more likely it is that, without regard to the intentions of the parties involved, content wiretapping will occur as a result of CDR information.

**IT IS DIFFICULT TO ASSURE THAT INTERNET COMMUNICATIONS UNDER
SURVEILLANCE ARE NECESSARILY BETWEEN DOMESTIC AND FOREIGN
COMMUNICATORS**

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Although most traffic on international links travels to or from a foreign host, a small amount of domestic traffic traverses these links as well—for example, some domestic traffic travels through Canada and then back to the US due to the vagaries of Internet routing. (This is partially a result of a 1940s AT&T master plan that made the US, Canada, and most of the Caribbean one integrated country, with no cable heads, or even international gateways, between them.) As such, monitoring links at the US border, with the goal of warrantless tapping of international traffic, could lead to unintentional tapping of domestic traffic. Because these links operate at a very high speed, it is difficult to analyze measurement data as they are collected. Furthermore, Internet traffic does not necessarily follow symmetric paths—the traffic from host A to host B does not necessarily traverse the same links as the traffic from B to A—so monitoring both ends of a conversation sometimes requires combining data collected from multiple locations, making this type of monitoring difficult in practice.

THE FISA RULES WHICH WERE LOOSENEED BY THE PATRIOT ACT WERE DESIGNED TO COMBAT PAST ABUSES OF SURVEILLANCE TECHNOLOGY

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Prior to the Protect America Act, United States wiretapping law was essentially governed by Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (P.L. 90-351), which regulated the procedure for wiretaps in criminal investigations, and the Foreign Intelligence Surveillance Act (FISA; P.L. 95-511), which did the same for foreign intelligence surveillance. These laws and their later derivatives laid out clear and specific procedures for obtaining wiretap warrants, which, with very minor exceptions, specified the particular line (or particular IP address or email account) on which the tapping was to occur.¹ Law enforcement obtained a warrant and sent this information to the communications provider, which installed the tap.

The US learned the hard way that oversight was critical if surveillance technologies were to be kept within legal bounds. During the Watergate era, the Senate Select Committee to Study Governmental Operations with respect to Intelligence Activities investigated 35 years of government electronic surveillance in the US, uncovering many abuses. These included wiretaps on congressional staff, Supreme Court Justices, Martin Luther King Jr. (in his case, sometimes for purely political purposes), as well as government investigations of such decidedly non-violent groups as the American Friends Service Committee, the National Association for the Advancement of Colored People, and the Women's Strike for Peace. It was clear that the "national security" rationale for many of the wiretaps was not justified. FISA was passed in response to these issues; the requirements governing FISA wiretapping were lifted almost verbatim from the carefully crafted recommendations of the Senate committee report.² Some of these safeguards delimiting government surveillance were removed by the USA Patriot Act (arguably the most important change the Patriot Act made in wiretapping law was modifying the requirement that foreign intelligence be the "primary" purpose of a FISA tap to a "significant" purpose³).

POST-9/11 IMMIGRATION DETENTIONS WERE EXPANSIVE, SECRETIVE, AND OFTEN UNCONNECTED TO THE THREAT OF TERRORISM

Susan M. Akram [Clinical Prof. of Law at the Boston University School of Law] and Maritza Karmely [Assistant Clinical Prof. of Law at the Boston University School of Law], "Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction without a Difference?" 38 University of California Davis Law Review 609 (2004-2005).

Immediately after 9/11, the FBI initiated an extraordinary and massive investigation into the terrorist attacks, an investigation designated "PENTTBOM." 48 The investigation had two main objectives: identifying the terrorists involved, as well as any possible accomplices, and coordinating all levels of law enforcement to prevent subsequent attacks against the United States or its interests abroad. 49 On orders by the Attorney General to use "every available law enforcement tool" to arrest persons who "participate in, or lend support to, terrorist activities," law enforcement focused on using federal immigration laws to arrest and detain noncitizens suspected of any terrorist ties. 50 More than 1200 citizens and noncitizens were detained for interrogation within the first two months of the attacks. 51 Although many were questioned and released with no charges pressed against them, many were detained for immigration law violations. 52 According to a number of DOJ officials, it was apparent very early on in the investigation that many, if not most, of the 9/11 detainees had no connection to terrorism. 53 Despite this knowledge, the DOJ maintained the FBI "clearance" policy, preventing the release of noncriminal aliens for long periods of time. 54 The Office of the Inspector General ("OIG") reported that a number of DOJ employees below the top echelons expressed grave concerns, at many different points in the process, about the delays and other significant violations that were plaguing the process itself. 55 Apparently, the serious problems with the clearance process and unjustified lengthy detentions were concerns raised by many officials through the chain of command of the INS and FBI. 56

The government instituted a variety of measures to conduct the arrests and detentions, and to ensure that those arrested remained in detention for as long as the government deemed necessary for its investigation. By November 2001, the DOJ publicly proclaimed that it would no longer disclose any information about the 9/11 detainees, including the numbers being held, their names, or their locations. 57 David Cole noted that "every aspect of the proceedings, no matter how routine, is closed to the public, to the press, and even to family members." 58

POST-9/11 IMMIGRATION DETENCTIONS WERE CRITICIZED HUMAN RIGHTS NGOS AND APPEAR TO BE RACIALLY SELECTIVE

Susan M. Akram [Clinical Prof. of Law at the Boston University School of Law] and Maritza Karmely [Assistant Clinical Prof. of Law at the Boston University School of Law], "Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction without a Difference?" 38 University of California Davis Law Review 609 (2004-2005).

Within a year after the attacks, Amnesty International, 59 Human Rights Watch ("HRW"), 60 the American Civil Liberties Union ("ACLU"), 61 and the Center for Constitutional Rights 62 published a number of detailed investigative reports on the arrests and detentions. According to the reports, by the end of 2002, most detainees arrested during the initial sweeps had been deported, released, or were charged with crimes unrelated to 9/11. 63 The DOJ provided varying and inconsistent information at different times in response to requests from Congress or court orders for information. 64 So far, the nationalities of post-9/11 detainees charged with federal or state crimes or held on material witness 65 warrants have not been made public. 66 Nevertheless, it is apparent from the government's lists, the investigative reports, and the OIG reports that virtually all of the "special interest" detainees whose nationalities were revealed came from South Asia, the Middle East, and North Africa. 67

The government claimed that all the detainees were initially questioned because they had some connection with, or some information about, terrorist activity. 68 Research in the published reports indicates, however, that the links to the investigation were in many cases nothing more than racial profiling on the basis of nationality, religion, and gender. As HRW noted: "[B]eing a male Muslim noncitizens from certain countries became a proxy for suspicious behavior. The cases suggest that where Muslim men from certain countries were involved, law enforcement agents presumed some sort of a connection with or knowledge of terrorism until investigations could subsequently prove otherwise." 69

POST-9/11 IMMIGRATION SWEEPS WERE CONDUCTED UNDER NEW PROCEDURES WHICH MADE THEM LITTLE MORE THAN A WITCH-HUNT

Susan M. Akram [Clinical Prof. of Law at the Boston University School of Law] and Maritza Karmely [Assistant Clinical Prof. of Law at the Boston University School of Law], "Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction without a Difference?" 38 University of California Davis Law Review 609 (2004-2005).

Soon after 9/11, the INS Executive Associate Commissioner for Field Operations issued eleven Operational Orders to INS field offices regarding the handling of 9/11 detainees over a twelve day period beginning September 15, 2001. 70 The Operational Orders dramatically altered normal procedures for immigration detainees and for INS handling of immigration cases. Before September 11, 2001, the INS district offices processed all routine immigration cases, other than the exceptional terrorism and war crime cases that were handled by the National Security Unit at the INS Headquarters. 71 One of the first changes the Operational Orders was the establishment of a new unit within the INS, called the Custody Review Unit ("CRU"), to manage and centralize decision-making in the post-9/11 cases. 72 Under these orders, the FBI determined whether individuals who were detained in the PENTTBOM investigation were to be designated as "special interest," and if so, what classification of "interest" they were to receive. The "special interest" designations were conducted entirely in secret. 73

"Special interest" cases became so on the basis of a myriad of "sources" – tips from spouses, neighbors, or members of the public 74 who said individuals were "suspicious" or accused them of being terrorists without any basis. 75 Others were randomly arrested in circumstances where they happened to encounter law enforcement and had the misfortune of being from the Middle East or were Muslim. 76 Muslim U.S. citizens and their spouses were also caught up in the sweep. 77 Others were detained because their names resembled those of the alleged hijackers. 78 As one FBI spokesman put it, "The only thing a lot of these people are guilty of is having the Arabic version of Bob Jones for a name." 79 The OIG Report confirms the arbitrary nature of the "leads" that precipitated most of the arrests, the designation of individuals as "special interest," and their detentions. 80

POST-9/11 THE UNITED STATES PLACED SUSPECTED TERRORISTS IN GUANTANOMO BAY OUTSIDE THE REACH OF U.S. COURTS, DENIED THEM DUE PROCESS, THREATENED INDEFINITE DETENTION, AND USED INTERROGATION TECHNIQUES THAT AMOUNT TO TORTURE

Tom Malinowski [Washington advocacy director for Human Rights Watch since April 2001], "Restoring Moral Authority: Ending Torture, Secret Detention, and the Prison at Guantanamo Bay," *The ANNALS of the American Academy of Political and Social Science* 2008 618: 148.

The administration brought hundreds of prisoners to Guantanamo on the assumption that U.S. courts could not reach them there. It decided that suspected terrorists would be held indefinitely without charge, or tried before military commissions that denied basic due process (Bush 2001), rather than brought before civilian courts. In addition, the CIA was authorized to seize terrorist suspects anywhere in the world (including, as it turned out, off the streets of democratic countries like Italy) and send them for interrogation to third countries where torture is routinely practiced. Other prisoners were held for years in secret overseas facilities to which even the International Committee for the Red Cross had no access.¹

The White House also authorized the CIA to use interrogation methods against captives that the United States has long considered to be torture. One such technique was water boarding, in which a prisoner is bound to an inclined table with his feet above his head, a cloth or cellophane in his mouth, and water poured over or down his throat until he begins to feel the effects of drowning. Prisoners were also subjected to "stress positions," such as being forced to stand still for hours on end and being bound in painful postures, exposed to extremes of heat and cold, and deprived of sleep for extended periods, often in combination.

AS DEMONSTRATED BY THE EXPERIENCE IN IRAQ, IT IS IMPERATIVE THAT THE U.S. LIVE UP TO ITS VALUES IN ORDER TO SUCCESSFULLY COMBAT TERRORISM

Tom Malinowski [Washington advocacy director for Human Rights Watch since April 2001], "Restoring Moral Authority: Ending Torture, Secret Detention, and the Prison at Guantanamo Bay," *The ANNALS of the American Academy of Political and Social Science* 2008 618: 148.

If the United States could beat al Qaeda simply by detaining or killing its members, then perhaps some degree of moral inconsistency and reputational harm might be acceptable. As the administration often asked, why should it matter that people don't like the United States as long as we're getting the terrorists? But as the Army Counterinsurgency Manual wisely reminds us, in fighting nontraditional terrorist foes, it is never possible to kill or capture every fighter (United States Army and United States Marine Corps 2006, para. 1-128 to 1-129). Victory depends on cutting off the enemy's "recuperative power"—its ability to gain new adherents to its cause—by diminishing its legitimacy while increasing your own. The key to beating al Qaeda, then, lies in convincing ordinary people in the Muslim world that America's values and vision for the future are more attractive than those of its enemies. The United States cannot do that if it excuses itself from the values it preaches to others.

The greatest damage may have been done during the early days of the insurgency in Iraq, when abuse of detainees at forward operating bases and facilities like Abu Ghraib was routine. Inevitably, many of the men U.S. forces rounded up in sweeps of dangerous Iraqi neighborhoods were not insurgents and were ultimately sent home. If these men experienced abuse, they likely emerged much more eager to fight Americans. As one Army sergeant put it in an interview with Human Rights Watch, "Half of these guys got released because they didn't do nothing. We sent them back to Fallujah. But if he's a good guy, you know, now he's a bad guy because of the way we treated him" (Human Rights Watch 2005, 14).

TORTURE PRODUCES BAD INTELLIGENCE

Tom Malinowski [Washington advocacy director for Human Rights Watch since April 2001], "Restoring Moral Authority: Ending Torture, Secret Detention, and the Prison at Guantanamo Bay," *The ANNALS of the American Academy of Political and Social Science* 2008 618: 148.

The Bush administration would probably agree today that the widespread use of harsh interrogation methods and secret detention was a mistake. But it argues that the use of such methods against a small number of high-value captives was worth the trouble, because it produced intelligence that saved lives. Assuming that some useful information was gleaned by water boarding al Qaeda prisoners (something that outsiders cannot really know), a fair assessment of the CIA program would depend on the answers to several other questions, all of which the next president should ask.

First, how much misleading information was obtained through torture? How many false leads have intelligence agencies wasted their time following as a result? How many innocent or insignificant people have been detained, and how many real terrorists have escaped capture? How many policy decisions were affected? After all, most experienced interrogators believe torture is unreliable—if you water board a prisoner or strip him naked in a freezing room or deny him sleep for days on end, he will usually say whatever he thinks his interrogator wants to hear, whether true or not, to end his suffering. And when interrogators hear what they want to hear, they are often tempted to believe it. Torture tends to confirm whatever false assumptions the intelligence community brings into an interrogation.

Perhaps the best example involves one of the first prisoners to be subjected to extraordinary rendition after 9/11—a suspected al Qaeda member named Ibn al Sheikh al Libi, who was held by the CIA and eventually sent to Egypt. Reportedly, al Libi's family was threatened; he was water boarded; and he was forced to remain standing overnight in a cold cell while being repeatedly doused with icy water (Ross and Esposito 2005). And he told his interrogators exactly what the administration wanted to hear: that Saddam Hussein was training al Qaeda members in the use of chemical weapons. This false information became the closing argument in Colin Powell's presentation to the UN Security Council in February 2003 making the case for war with Iraq (Jehl 2005). Perhaps the greatest intelligence failure in American history came about in part because the administration believed in the CIA program and the tortured confessions it produced.

TORTURE UNDERMINES COMMUNITY COOPERATION IN INTELLIGENCE GATHERING

Tom Malinowski [Washington advocacy director for Human Rights Watch since April 2001], "Restoring Moral Authority: Ending Torture, Secret Detention, and the Prison at Guantanamo Bay," *The ANNALS of the American Academy of Political and Social Science* 2008 618: 148.

Second, how much good intelligence was lost because brutal methods were used? One of the best sources of intelligence on terrorist plots is the community in which terrorists hide. Public cooperation has been the key to preventing many potentially deadly attacks: for example, it was a tip from a member of the Muslim community in London that allowed British investigators to foil a plot to bomb several transatlantic flights last year (Whitlock and Lizner 2006). But people who live in those communities are much less likely to come forward with information about their neighbors, acquaintances, and relatives if they think the people they are turning in are liable to be abused.

NONCOERCIVE INTERROGATION METHODS WORK BETTER THAN TORTURE

Tom Malinowski [Washington advocacy director for Human Rights Watch since April 2001], "Restoring Moral Authority: Ending Torture, Secret Detention, and the Prison at Guantanamo Bay," *The ANNALS of the American Academy of Political and Social Science* 2008 618: 148.

The Army Field Manual explicitly condemns cruel and coercive techniques like water boarding as ineffective and unlawful. In their place, it authorizes a range of psychological techniques designed to persuade or deceive a prisoner into giving up information. Some focus on building positive rapport; others take advantage of a detainee's insecurities and fears. All are based on the insight that the purpose of interrogation is not to make a prisoner talk (which torture can certainly do), but to make a prisoner want to talk and, most important, to talk the truth.

Experienced interrogators believe that these techniques work more reliably than coercive methods. FBI officials have argued that they were working on some of the high-value al Qaeda detainees before the administration lost patience and turned them over to the CIA—or to foreign governments—for more brutal treatment (Eban 2007). Such techniques led to the breakthrough that allowed U.S. forces to pinpoint Abu Musab Al-Zarqawi, the leader of al Qaeda in Iraq. Special forces interrogators spent weeks working on a man with connections to Zarqawi's network, playing on his ego and pride and convincing him he would have a big place in the future of Iraq if he cooperated; eventually, he willingly gave up the information that led to Zarqawi's death. Reading the remarkable account of this interrogation compiled by Mark Bowden (2007) in the *Atlantic Monthly*, it is hard to imagine that coercive techniques would have worked; on the contrary, they probably would have caused the key source to clam up or to lie.

THE FORMER HEADS OF THE 9/11 COMMISSION REPORT THAT THERE ARE STILL MAJOR GAPS SPECIFICALLY IN THE ABILITY TO DETECT EXPLOSIVES ON AIRCRAFT AND COORDINATE EMERGENCY RESPONDERS

Brian Bennett, "Post-9/11 assessment sees major security gaps," *Los Angeles Times* 30 Aug. 2011, n. pag. Web. 31 Aug 2011.

Reporting from Washington— Despite the outlay of hundreds of billions of dollars and a vast reorganization of federal agencies since the Sept. 11 attacks, major gaps remain in the government's ability to prevent and respond to a terrorist strike, according to an assessment by the former heads of the 9/11 Commission.

The report, which will be released Wednesday, warns that the nation's ability to detect explosives hidden on passengers boarding airplanes "lacks reliability." It describes emergency communications used by first responders in urban areas as "inadequate." And it calls efforts to coordinate rescues "a long way from being fully implemented."

The panel, formally known as the National Commission on Terrorist Attacks Upon the United States, was created by Congress in late 2002 as an independent, bipartisan group to investigate the hijackings of four jetliners by Al Qaeda operatives. Its final report included numerous recommendations for reforms in the intelligence, law enforcement and domestic security communities.

**THE FEDERAL GOVERNMENT HAS FAILED TO TAKE ACTION ON PLANS TO IMPROVE
THE COMMUNICATIONS INFRASTRUCTURE THAT IS CRITICAL FOR FIRST RESPONDERS
DURING A TERRORIST ATTACK**

Brian Bennett, "Post-9/11 assessment sees major security gaps," *Los Angeles Times* 30 Aug. 2011, n. pag. Web. 31 Aug 2011.

"Until some of these things are done, we aren't going to be as safe as we should be," Kean said in an interview.

Kean said it was "outrageous" that Congress had not passed a law to allocate new radio spectrum to first responders.

The inability of firefighters and police to talk to each other from the rubble of the World Trade Center and the Pentagon was a "critical failure" on Sept. 11, 2001, according to the report, but a recommendation to dedicate radio spectrum for first responders has languished in Congress.

In February, President Obama called for \$7 billion to build an emergency broadband network using a designated band of radio spectrum known as D-block. But such a bill has not come to a vote in the Senate, and the House has not considered it.